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Supreme Court of the United States

OCTOBER TERM - 1955

No. 445

NATIONAL SURETY CORPORATION v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON, THIRD PARTY DEFENDANT

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON, INTERVENOR

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Claims
By First National Bank in Houston

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INDEX

	PAGE
CAPTION	1
REFERENCE TO OPINION OF COURT OF CLAIMS	1
GROUNDS OF JURISDICTION	2
QUESTION PRESENTED	3
STATUTE INVOLVED	3
STATEMENT OF FACTS	3-4
AMPLIFICATION OF REASONS RELIED ON FOR ALLOWANCE OF WRIT	5

LIST OF AUTHORITIES

CASES

Central Bank v. United States, 345 U.S. 639, 646	2
Central Nat. Bank of Richmond, Va. v. United States, 91 Fed. Supp. 738, 740	2, 7
Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 149 Fed. 2d 73	2, 6, 9, 10, 12
General Casualty Co. of America v. Second National Bank of Houston, 178 Fed. 2d 679	2, 6, 7, 8, 9, 10
John A. Hadden, Trustee in Bankruptcy of Manufacturers Trading Corp. and Manufacturers Discount Corp., Condenser Service & Engineering Co., Inc., et al., Intervenors, v. United States, 132 Fed. Supp. 202	2, 6
Martin v. National Surety Co., et al., 300 U.S. 588	2
Royal Indemnity Co. v. United States, 117 Ct. Cls. 736 (93 Fed. Supp. 891)	5, 7, 9, 12
United States v. Hadden, et al., 192 Fed. 2d 327, 329	2
Waxman v. United States, 112 Fed. Supp. 570, 588	2, 8
Chap. 81, Titl 28, Sec. 1255, U.S.C.A.	2

APPENDIX

(1) Opinion, Finding and Judgment of the Court of Claims	15
(2) Opinion in John A. Hadden, Trustee case	49
(3) Assignment of Claims Act of 1940, as amended	54

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To The Honorable Supreme Court of the United States:

The Petitioner, First National Bank in Houston, respectfully presents this petition for a writ of certiorari to the United States Court of Claims.

a. Opinion of the United States Court of Claims, cited in —Fed. Supp.— appended hereto, and also Opinion of said Court in John A. Hadden, as Trustee in Bankruptcy of Manufacturers Trading Corporation

and Manufacturers Discount Corporation v. The United States, Condenser Service & Engineering Co., Inc., et al., Intervenors, decided on same day and referred to by both the majority and minority of the Court, in the pertinent case, cited in 132 Fed. Supp. 202.

b. The jurisdiction of this Court is invoked upon the following grounds:

(i) The judgment of the United States Court of Claims, sought to be reviewed herein, was made and entered on July 12, 1955.

(ii) The opinion of the majority of the Court is in direct conflict with the opinions of this Court in Central Bank v. United States, 345 U.S. 639, 646, and Martin v. National Surety Co., et al., 300 U.S. 588; and is directly contrary to the holdings of United States Court of Appeals for the Fifth Circuit in Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 149 Fed. 2d 73, and General Casualty Co. of America v. Second National Bank of Houston, 178 Fed. 2d 679, and contrary to the view expressed by The United States Court of Appeals for the Sixth Circuit in United States v. Hadden, et al., 192 Fed. 2d 327, 329. Further, it is inconsistent with its own opinions in Waxman v. United States, 112 Fed. Supp. 570, 588, and Central Nat. Bank of Richmond, Va. v. United States, 91 Fed. Supp. 738, 740.

(iii) Chapter 81, Title 28, Section 1255, U. S. C. A. which provides: "Cases in the Court of Claims

may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or the claimant."

3. Question presented for review: Whether claims of sureties, based upon assignment provisions in contractor's applications for bonds, are prior and superior to claim of First National Bank in Houston, resting upon assignment to it, duly executed by contractor, pursuant to provisions of Assignment of Claims Act of 1940, (31 U.S.C.A., Sec. 203, 54 Stat. 1029) written notice of same having been duly filed by assignee in accordance with its provisions, as security for money advanced by said assignee to the contractor?

(i) The majority opinion of the United States Court of Claims in Royal Indemnity Co. v. The United States, 117 Ct. Cls. 736 (93 Fed. Supp. 891) and the case at bar, having by interpretation and application frustrated and nullified the intent and purpose of Congress in the enactment of the Assignment of Claims Act of 1940, the question presented is of grave public interest, affecting national defense and security, impelling this Court to resolve the same.

d. Statute involved in the case: Assignment of Claims Act of 1940, as amended, 31 U. S. C. A., Section 203, 54 Stat. 1029, 65 Stat. 41, copy of which is appended hereto.

e. A concise statement of the case containing the facts material to the consideration of the questions presented and involved herein:

This is a case where the National Surety Corporation, the Fidelity and Deposit Company of Maryland, and the First National Bank in Houston assert claim to the unpaid balances of two contracts entered into by and between Thomas Bryan and Associates, Inc., and The United States of America through the United States Atomic Energy Commission, viz:

> Contract No. TA-16, Project D, Los Alamos, New Mexico, known as Contract No. AT (29-1)-994, for the construction of Group 138 Buildings and Facilities, executed September 1, 1950, and to secure the performance of which and payment of labor and material costs, the plaintiff, National Surety Corporation, executed its bonds with the contractor, Thomas Bryan and Associates, Inc., as principal, and itself as surety, claiming the unpaid balance of said contract; and
>
> Contract in Area TA-3, Los Alamos, New Mexico, known as Contract No. AT (29-1)- 838, for the construction of steam and electric plant, executed November 29, 1949, and to secure the performance of which and payment of labor and material costs the plaintiff, Fidelity and Deposit Company of Maryland, executed its bonds with the contractor, Thomas Bryan and Associates, Inc., as principal, and itself as surety, claiming the unpaid balance of said contract; and

The First National Bank in Houston, Texas, as assignee of the contractor, Thomas Bryan and Associates, Inc., claims the unpaid balances of both of the afore-mentioned contracts under (a) Notice of Assignment of Accounts, executed by Thomas Bryan and Associates, Inc. on January 30, 1950, pursuant to Art. 260-1, Texas Civil Statutes, duly filed of record in the office of the County Clerk of Harris County, Texas, pursuant to the provisions of said law on said date; and (b) assignments executed by said Thomas

Bryan and Associates, Inc. on January 21, 1951, pursuant to the Assignment of Claims Act of 1940 (Tit. 31, Sec. 203 U.S.C.A.) and to the provisions of Art. 24(a)(b) (Tr. Stip. pp. 115-116; 166-167) of the afore-mentioned contracts, due notices of which assignments were given as required by said Act and contract provision to all parties therein provided, including the aforesaid surety companies.

That subsequent to the default by Thomas Bryan and Associates, Inc. in the completion of said contracts, the surety companies abandoned said contracts and they were completed by The United States of America (Tr. Stip., pp. 139, 142).

That pursuant to a compromise settlement and stipulation entered with the defendant, The United States of America, by all of said parties, the said defendant is now in the position of a stakeholder only and, as such, is holding an unpaid balance in the sum of $100,918.34 of the afore-mentioned Contract No. AT (29-1)-994, and an unpaid balance in the sum of $65,241.61 of the afore-mentioned Contract No. AT (29-1)-838, subject to the order and judgment of this Court, after deducting an offset by the defendant for taxes in the sum of $45,429.58 apportioned between the two contracts. (Tr. Stip. p. 173, par. 4)

Amplification of Reasons Relied on for Allowance of Writ

a. The question presented has arisen before the United States Court of Claims upon several occasions since Congress enacted the Claims Act of 1940. In the *Royal Indemnity Co.* case, supra, the Court divided three and two; the majority of the Court, in Opinion written by the late Judge Howell, Judges Whitaker and Littleton concurring,

holding Surety had prior and superior right; while Judge Madden wrote a strong dissent, with Jones, Chief Judge, concurring, expressly in agreement with holding of the United States Court of Appeals for the Fifth Circuit in *Coconut Grove Exchange Bank,* supra, and *General Casualty Co.*, supra, cases. The question was squarely presented to that Court in the case at bar. Here the majority opinion is written by Judge Whitaker, and Judges Madden and Littleton concurring, holding Sureties have first and superior right, while Judge Laramore wrote a strong dissenting opinion, with Jones, Chief Judge, concurring. (Dissenting opinion appearing in the *John A. Hadden, Trustee,* case, decided on same day, and which is appended hereto.) Then, too, the question is raised in the *John A. Hadden, Trustee,* case, supra, and in that case Judge Madden wrote the majority opinion with Judge Whitaker, Littleton, and Jones, Chief Judge, concurring, while Judge Laramore wrote the dissenting opinion referred to in case at bar.

These decisions of the Court of Claims create a confusing and unsatisfactory situation, as to the pertinent question, to say the least, and injurious to public interest in that it has set at naught an Act of Congress, the intent and purpose of which is to aid in the national defense. By its decisions, the Court has made that Act of Congress "a snare and a delusion, a trap for the unwary". It remains for this Court to set it aright.

b. First National Bank in Houston made various loans to and advanced funds to the contractor, Thomas Bryan and Associates, Inc., between January 30, 1950 and February 23, 1951, and to secure repayment of funds so loaned and advanced the said contractor executed assignment of Contract No. AT (29-1)-994 and Contract No. AT (29-1)-838 under and pursuant to the Assignment of Claims Act

of 1940, as amended (Tit. 31, 203, U.S.C.A.), notice of which was given to defendant, The United States of America, United States Atomic Energy Commission, and to all other parties, including the plaintiff surety companies, as required by the said Assignment of Claims Act and also in accordance with the provisions of Art. 24 (Tr. Stip., pp. 115, 166) of each of said contracts.

This assignment to the bank is the only legal and valid assignment in the record of this case. The said Assignment of Claims Act, Sec. 203, of Tit. 31, U.S.C.A., expressly excepts a bank from the prohibition against assignments of claims against the United States. It does not except surety companies. The plaintiffs, being surety companies, do not, therefore, have a valid, legal assignment of the unpaid balances of the afore-mentioned contracts. (*Royal Indemnity Co. v. The United States*, 93 Fed. Supp. 891, 894, Ct. of Cls., 1950.)

The record here is clear that the bank made the loans to and advanced the funds to the contractor to assist and enable it to carry on and perform its contracts with the defendant. It has been frequently stated by the courts that this was the purpose of Congress in the enactment of the Assignment of Claims Act of 1940, as amended.

In *Central Bank v. United States*, 345 U.S. 639, 646, where it was urged "that the Act should be construed so as to protect the United States", this Court said: "The short answer to this is that the Act should be construed so as to carry out the purpose of Congress to encourage the private financing of government contracts."

In *General Casualty Co. v. The Second National Bank of Houston*, 178 Fed. 2d 679, 680 (5th Cir., 1949) the Court stated:

> "The original heading of the 1940 amendment of the federal anti-assignment act was as follows: 'To assist in the national-defense program by amending sections 3477 and 3737 of the Revised Statutes to permit the assignment of claims under public contracts.' 54 Stat. 1029. The evident purpose of the legislation was to make it possible for contractors to pledge to a bank, as collateral security, their claims against the Government in order to enable them to borrow money to do the work required by the contract. Pages 12, 557, Part II, Vol. 86, Cong. Record; 31 U.S.C.A. sec. 203, as amended. See also: Prairie State Bank of Chicago v. United States, 164 U.S. 227, 17 S. Ct. 142, 41 L. Ed. 412; Martin v. National Surety Co., 300 U.S. 588, 57 S. Ct. 531, 81 L. Ed. 822; Kane v. First National Bank, 5 Cir., 56 F. 2d 534, 85 A.L.R. 362; Third National Bank of Miami v. Detroit Fidelity and Surety Co., 5 Cir., 65 F. 2d 548; Town of River Junction v. Maryland Casualty Co., 5 Cir., 110 F. 2d 278; Id., 5 Cir., 133 F. 2d 57; Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 5 Cir., 149 F. 2d 73."

And in *Waxman v. The United States,* 112 Fed. Supp. 570, 588 (Ct. Cls., 1953) the Court pointed out:

> "That Act was amended to make it easier for government contractors to secure financing for carrying out obligations to the Government to the end that government contracts might be speedily and effectively performed. U. S. v. Hadden, 6 Cir., 192 F. 2d 327, General Casualty Co. of America v. Second National Bank of Houston, 5 Cir., 178 F. 2d 679, Royal Indemnity Co. v. United States, 93 F. Supp. 891, 117 Ct. Cl. 736; Central National Bank of Richmond v. United States, 91 F. Supp. 738, 117 Ct. Cl. 389."

Therefore, to deny the bank its right to the unpaid balances of the pertinent contracts is to nullify the purpose and

intent of Congress and constitutes a usurpation of the exclusive function of that legislative body. In the dissenting opinion in the *Royal Indemnity Co. v. United States*, case, supra, it is pointed out that the denial of the claim of the bank under the Assignment of Claims Act is a "substantial frustration of the purpose of said Act."

The situation in *General Casualty Co. v. The Second National Bank of Houston*, supra, was similar, if not parallel, to that of the instant case. There the contractor defaulted and the Government contracted with others to finish the work and the surety company was required under its bonds to pay certain laborer's and materialmen's claims, for which it sought reimbursement out of the unpaid balance of the contract. The trial court adjudged the assignments of the bank superior to rights asserted by the surety company and followed the rule laid down in *Grove Exchange Bank v. New Amsterdam Casualty Co.*, 149 Fed. 2d 73 (5 Cir., 1945). On appeal, the Circuit Court of Appeals affirmed the decision of the lower court and pointed out:

> "Under its assignments, the bank was entitled to the full amount of progress payments due the contractor immediately prior to the latter's default, not to exceed the amount of indebtedness due the bank. The surety was entitled to demand that the sum of the retained percentages withheld by the owner be applied to debts due for labor and material, which the contractor had failed to pay, but there is nothing in the record to indicate that this amount or any portion thereof is a component part of the funds in controversy. The United States was entitled to use the balance of the contract price, including these funds, to complete the contract, which it did; * * *"

And that is the situation here. There is no evidence that the unpaid balances in possession of the United States Gov-

ernment, or any portion thereof, constituted the retained percentages. The implication is well founded that the Government used such funds and portion of the balance of contract price in completing the contracts. Yet, just as in that case, there is here no evidence showing aggregate amount of the retained percentages when the contractor defaulted, nor is there any evidence that the surety companies at that time demanded that the retained percentages be applied to debts for unpaid labor and materials; but on the other hand, the surety companies permitted United States Government to arrange for completion of the work out of retained percentages and other amounts to become due on completion of the contracts. Just as in the *General Casualty Co.* case, supra, there is nothing in the evidence and the Stipulations to contravene the implication that the Government "expended the entire retained percentages in defraying the cost of completing" the contracts.

The rights of the bank and the effect of Section 203 are clearly and irrefutably stated by the Circuit Court of Appeals for the Fifth Circuit, in *Coconut Grove Exchange Bank v. New Amsterdam Casualty Co.*, 149 Fed. 2d 73, 77 (1945), as follows:

> "It is settled by the decisions beyond question that the primary purpose of Section 203, supra, before its amendment, was for the benefit of the Government, and in order to keep it from being embroiled in controversies between the contractors and their assignees and creditors. This is also one of the primary *purposes* of the section as amended, but what is the *effect* of the amendment? Why was there a relinquishment of so many conditions which had theretofore made assignments illegal? Even if, as counsel for both parties concede, the amendment was to facilitate the financing

of contracts in the aid of national defense and to make it so contractors could borrow money from banks and other lending institutions so as to thereby promote the national defense, it still could not now be accurately asserted that the only *effect* was to protect the Government. The amendment made valid that which had theretofore been void and if it were intended not to affect any rights between the parties relating to the validity of such contracts, why did the Act contain the provision that '*Notwithstanding any law to the contrary* governing the validity of assignments any assignment pursuant to this paragraph and the following paragraph shall constitute a valid assignment *for all purposes*'? (Emphasis added.) If an assignment is valid as to the Government but invalid against the Surety and others, could it be said to be 'valid for all purposes'? If the amendment was only for the protection of the Government, why does it provide that the Government could not reduce the assigned claim or set it off by any claim that it has against such an assignor? In addition to protecting the Government, which was the prime purpose of the section before its amendment, as construed in Martin v. National Surety Co., 300 U.S. 588, 57 S. Ct. 531, 81 L. Ed. 822, the amendment of 1940 had the incidental effect of protecting that assignee who filed his assignment and gave notice under the provisions of the statute. Thereafter no other assignment would be effective and all the proceeds would be paid to the one assignee who had complied with the law, provided that assignee were a 'bank, trust company, or other financing institution, including any Federal lending agency'. An assignment made before 'the issuing of a warrant for the payment thereof' to a surety company, which is neither a bank, trust company financing institution or Federal lending agency, is still void and was not made valid by the amendment. We cannot escape the conclusion that the rights of the surety were incidentally affected."

In his dissenting opinion in the *Royal Indemnity Co.* case, supra, Judge Madden (concurred in by Chief Judge Jones) stated that his dissent was "in substantial agreement with the decision in *Coconut Grove Exchange Bank v. New Amsterdam Casualty Co.*, supra."

The Court, in *Coconut Grove Exchange Bank* case, supra, further pointed out that:

> "* * * no superior equity in the Surety will appear unless it shows that the money lent by the Bank was diverted, or used for purposes outside the contract, for if the money lent was applied to the payment of labor and materials used in the contract, thereby discharging obligations for which the Surety would otherwise have been liable, the Surety was in no wise injured by the transaction. It cannot have its liability discharged with the Bank's money and then recover from the Bank money equivalent to that so used for its benefit by its principal. It is fundamental that one seeking in equity to recover money from another must allege and prove injury—not benefit.
>
> "We hold, therefore, that the 1940 amendment of Section 203, while being primarily for the protection of the United States and not for the regulation of the equities of the claimants, as between themselves, nevertheless, did incidentally affect the rights between the assignee of contractor and the surety so as to make assignments to a bank from a contractor for the purposes of the contract valid and the possession by the assignee bank of proceeds of the contract lawful. The $12,220.29 came into the possession of the Bank lawfully by virtue of the only valid assignment that was, or could have been, made under the statute, and anyone seeking to recover any portion of such money had the usual burden of proof. Moreover, to the extent that the money lent by the Bank to the Contractor was used to pay subcontractors or others furnishing labor and materials used

in the performance of the contract, the Surety was not injured, and in the absence of allegations and proof by the Surety Company of a wrongful diversion of funds, it failed to sustain the equitable right which it claims for the recovery of the monies repaid to the Bank."

In the instant case, there is no evidence in the Stipulations, or otherwise, to show that the money lent by the bank was diverted or used for other purposes outside the contracts. On the other hand, the record points to a contrary conclusion. Both contracts were assigned to the bank and the record shows assignment to the bank of invoices of monies due on one of the contracts to the bank (Tr. Stip., p. 113, par. 17), which indicates, at least impliedly, that the money was used directly in the furtherance of the work of said contracts.

WHEREFORE, your petitioner prays that writ of certiorari to the United States Court of Claims be allowed and that this Court review the decision of that Court made and entered herein.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

(Decided July 12, 1955)

No. 419-52

NATIONAL SURETY CORPPORATION v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON, THIRD PARTY DEFENDANT

No. 149-53

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON, INTERVENOR

Mr. Emanuel Harris for National Surety Corporation and Fidelity and Deposit Company of Maryland, and *Mr. M. U. S. Kjorlaug* for First National Bank in Houston. *Messrs. Max E. Greenberg* and *Boyles & Billingsley* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General Warren E. Burger*, for defendant.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

These cases involve contests between surety companies on a defaulting contractor's payment bonds and a bank which sues under an assignment of the moneys due on the contracts given by the contractor to secure loans by the bank.

In both cases, on default of the contractor, the sureties paid laborers and material men to whom the contractor was indebted for labor and material furnished in the performance of the contracts. They claim subrogation to their rights against the contractor and to the rights of the United States on the bonds.

1. Contests between a bank and a surety company have been before this court in a number of cases. The most recent are *Modern Industrial Bank v. United States*, 101 C. Cls. 808; *Hardin County Savings Bank et al. v. United States*, 106 C. Cls. 577; and *Royalty Indemnity Co. v. United States*, 117 C. Cls. 736. In each case we have decided that the equity of the surety company was superior to the rights acquired by the bank under a valid legal assignment. In so holding, we have relied primarily upon the decisions of the Supreme Court in *Prairie State Bank v. United States*, 164 U.S. 227, and *Henningsen v. United States Fidelity and Guaranty Co.*, 208 U.S. 404. In *United States v. Munsey Trust Co.*, 332 U.S. 234, at page 240, the Supreme Court said:

> * * * From *Prairie State Bank v. United States*, 164 U.S. 227, to *American Surety Co. v. Sampsell*, 327 U.S. 269, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money. * * *

We reiterate our former opinion that the equity of the surety company is superior to the rights of the bank acquired under an assignment, whether the surety's rights are derived from the discharge of its liability on a performance bond or on a payment bond. In *Prairie State Bank*, *supra*,

the surety had discharged its liability on a performance bond, and in *Henningsen, supra,* its liability on a payment bond.

No one seems to deny that the rights of a surety on a performance bond are superior to the rights of a bank as the contractor's assignee. This is because, as held in the *Prairie State Bank* case, the surety is subrogated to the rights of the United States, and the United States had the right to use the money in its hands to complete the contract on the default of the contractor. Hence, the surety having completed the contract, it was entitled to the money. It was entitled to it as against the bank because its rights of subrogation arose at the time it executed the bond, which was prior to the assignment to the bank.

But it is said, notwithstanding the holding in the *Henningsen* case, that this is not true in the case of a surety on a payment bond. The theory is that the United States is under no legal obligation to pay laborers and materialmen *(United States v. Munsey Trust Co.,* 332 U.S. 234), that all it is interested in is getting its building, and if it gets it, it does not care who gets the money left in its hands, whether the laborers and materialmen, or some bank to whom the defaulting contractor had assigned it.

This is contrary to the holding in the *Henningsen* case. The decision in that case was based on the discharge by the surety of the equitable obligation of the United States to see that the laborers and materialmen were paid.

Customarily, in a construction contract between private parties, laborers and materialmen have a lien on the building to secure payment of their claims; hence, if a contractor fails to pay laborers and materialmen, the owner of a private

building has the right to use any money owing to the contractor to discharge his obligation to the laborers and materialmen. His right to do this is superior to the rights of an assignee. But a building erected for the United States is not subject to a lien, and the United States is under no legal liability to pay laborers and materialmen; but it is under an equitable obligation to do so. To discharge this equitable obligation, Congress passed the Miller Act (49 Stat. 793), carrying forward prior acts and enlarging them, which requires the execution of a payment bond payable to the United States as a condition precedent to the letting of a Government contract. Under such bond the surety guarantees the payment of laborers and materialmen, and upon performance of this obligation, it relieves the United States from its equitable obligation to see that the laborers and materialmen are paid. For this reason it is subrogated to the right of the United States to apply this money to the payment of laborers and materialmen, in the discharge of its equitable obligation, although the United States was under no legal liability to do so. Since the right of the United States to so use the money is superior to the bank's rights as the contractor's assignee, the right of the surety who pays them is superior to the bank's right.

There would seem to be no doubt of the right of the United States to use the contractor's money in its hands to discharge the contractor's obligation to laborers and materialmen. One of the obligations assumed by the contractor under his contract with the United States was to pay laborers and materialmen. If he fails to do so, the United States has the right to use money due him to do what he agreed to do. It would be inequitable for the United States to retain the benefits of what the laborers and materialmen had done for it and pay to some one else money which the

contractor should have paid to them. See *Henningsen v. United States Fidelity and Guaranty Co., supra.*

Since the United States is under an equitable obligation to see that laborers and materialmen are paid, as held in the *Henningsen* case, *supra,* the laborers and materialmen have the equitable right to assert a claim to moneys in the hands of the defendant which are due the contractor. When the surety pays the laborers and materialmen, it becomes subrogated to their right to assert an equitable claim to the moneys in the hands of the defendant. It has frequently been held that they have equitable priority to these moneys over the general creditors of the contractor and over his assignees. *Greenville Savings Bank v. Lawrence,* 76 Fed. 545 (C.C.A. 4); In re *P.McGarry and Son,* 240 Fed. 400 (C.C.A. 7); *Belknop Hardware Co. v. Ohio River Co.,* 271 Fed. 144 (C.C.A. 6); *American Surety Co. v. Westinghouse Electric Mfg. Co.,* 75 F. 2d 377 (C.C.A. 5), affd. 296 U.S. 133; and *Martin v. National Surety Co.,* 85 F. 2d 135 (C.C.A. 8), affd. 300 U.S. 588.

See also our opinion in *John A. Hadden, Trustee, v. United States,* No. 50038, this day decided.

In *United States v. Munsey Trust Co., supra,* the Supreme Court said that the United States was not legally liable to laborers and materialmen, but they did not say that laborers and materialmen could not assert an equitable claim to moneys in the hands of the United States payable under the contract. We think they can. To permit them to do so in no way interferes with the full exercise of the sovereign powers of the United States. It does not subject the defendant to liability beyond the amount it has in its hands confessedly due and owing to somebody.

Looked at from another light, the surety's rights are superior to the rights of the bank: It is settled that the surety's rights arising by subrogation or substitution relate back to the date of the execution of the surety bonds. *Prairie State Bank v. United States, supra; Henningsen v. United States Fidelity and Guaranty Co., supra;* and the cases following those decisions. Thereupon, there accrues to the surety the equitable right to the moneys due from the Government to the contractor to the extent that the surety discharges the contractor's obligation to the Government.

Subsequently, the contractor, under the burden of this obligation to the surety, goes to a bank to borrow money. He tells the bank that he has this contract with the Government and offers to assign to the bank moneys to become due thereunder. He may or may not tell the bank that he has executed bonds to secure the faithful performance of the contract, but whether or not he does, the bank is charged with notice thereof, because of the requirement of the Miller Act, *supra.* Not only is the bank charged with notice thereof, but it is inconceivable that it did not have actual notice thereof. Hence, when the bank lends the contractor money, it lends him the money with knowledge of the fact that he has previously obligated himself to the surety to turn over to it any money to which he is entitled under the contract, to indemnify the surety for any loss it may sustain on the bonds. This is an obligation already incurred and, therefore, any obligation which the contractor may assume to the bank must be subject to his prior obligation to the surety. The bank, therefore, lends the money under the risk that there will not be enough left to pay its debt after the contractor's prior obligation to the surety has been satisfied.

Furthermore, it does not affirmatively appear in this case

whether or not the money borrowed from the bank was used in the performance of these contracts, and, if so, which of the two. The purpose of the 1940 amendment to the Assignment of Claims Act (41 U. S. C. 15; 61 Stat. 501; 65 Stat. 41) was to enable a contractor to obtain money to finance his contracts with the United States. If the money borrowed was not used in the performance of the contract, the lender is not equitably entitled to the benefit of the assignment.

We reiterate what we have said in prior cases that the 1940 amendment to the Assignment of Claims Act, *supra,* was intended to do nothing more than to remove the prohibition embodied in Revised Statutes 3477 and 3737, against assignment of a claim against the United States in the case of a financial institution lending money to a contractor with the Government. Prior to the passage of the amendment, the contractor could not assign his claims against the Government, but under this Act he was permitted to do so to a financial institution. However, under the assignment, the bank, insofar as prior obligations were concerned, received no more than it would have gotten had Revised Statutes 3477 and 3737 not been enacted.

Notwithstanding the passage of the amendment, the issue since its passage is the same as it was when the *Prairie State Bank* case and the *Henningsen* case were decided, to wit, who has the superior equity, the surety or the bank.

We recognize that the Fifth Circuit takes the contrary view in *Coconut Grove Exchange Bank v. The New Amsterdam Casualty Co.,* 149 F. 2d 73, and *General Casualty Co. v. Second National Bank of Houston,* 178 F. 2d 679.

2. In the National Surety Company case, the First National Bank in Houston also claims under an assignment

executed under article 260-1 of Vernon's Civil Statutes of the State of Texas. This assignment was executed on January 30, 1950. The contract in the National Surety Company case was entered into on September 1, 1950, and, hence, the statute relied upon is not applicable because it relates to the assignment of accounts due or to become due "under an existing contract." This contract not having been in existence at the time of the assignment, amounts due under it are not covered by the assignment. It was so held by the Texas Court of Civil Appeals in *Kieran v. Salley*, 244 S.W. 2d 663. The same thing was held by the United States District Court for New Jersey concerning a similar statute, in the case of *Seaboard Surety Co. v. State of North Dakota*, 94 F. Supp. 177. The surety's assignment was by operation of law, which does not appear to be covered by the Texas statute.

In the Fidelity and Deposit Company of Maryland case, the bank relies also upon the assignment executed under article 260-1 of Vernon's Civil Statutes of the State of Texas. That contract was executed prior to the assignment and, hence, accounts due under the contract would have been covered by the assignment, but the surety's rights arose when the contract with the United States was signed, which was prior to the assignment to the bank and, hence, the surety's rights are superior.

3. The bank says that the sureties are claiming only as the assignees of the trustee in bankruptcy of the contractor, Thomas Bryan & Associates, Inc., and that, therefore, they are entitled to recover only if the contractor is entitled to recover, and it says that the contractor is not entitled to recover as against the bank because of its assignment to the bank. This is in error.

The trustee in bankruptcy did assign "all claim and right to the balance on the above contract to National Surety Corporation and does hereby consent to the payment of said balance to said National Surety Corporation." But the sureties do not rely alone upon this assignment; they rely upon their right of subrogation as the sureties on the contractor's bonds, which rights arose long prior to the assignment to the bank. There is nothing to show that when the sureties accepted the assignment from the trustee in bankruptcy they intended to forego all their other rights.

The order of the court in the bankruptcy proceedings made no reference to the conflicting claims of the sureties and the bank.

4. The Fidelity and Deposit Company of Maryland was the surety on the payment and performance bonds on contract AT (29-1)-838, and the National Surety Corporation was the surety on the performance and payment bonds on contract AT (29-1)-994. The parties have stipulated that the amount due by the defendant on both of these contracts is $166,159.95, less an amount of $45,429.58 which the contractor owes the defendant for taxes. This leaves an amount due by defendant on both contracts of $120,730.37.

It is agreed that the $45,429.58 due the defendant for taxes shall be apportioned between the amounts due by the defendant on contracts AT (29-1)-838 and AT (29-1)-994 in proportion to the amounts due on each contract.

On each contract the sureties have paid amounts largely in excess of the amounts now due by the defendant on said contracts.

According to the stipulation of the parties, including the Government, on contract AT (29-1)-994, on which the Na-

tional Surety Corporation was surety, there is due, before taxes, the sum of $100,918.34. On contract AT(29-1)-838, on which Fidelity and Deposit Company of Maryland was surety, there is due the sum of $65,241.61. According to the stipulation, therefore, there is to be deducted from the $100,-918.34, which the plaintiff National Surety Corporation is entitled to recover, the sum of $27,591.95 for taxes, and there is to be deducted from the amount of $65,241.61, which the Fidelity and Deposit Company of Maryland is entitled to recover, the sum of $17,837.63 for taxes.

Judgment will be entered in favor of the National Surety Corporation for the sum of $73,326.39, and in favor of the Fidelity and Deposit Company of Maryland in the sum of $47,403.98.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

LARAMORE, *Judge*, dissenting:

I respectfully dissent for the same reasons as those set forth in my dissenting opinion in the case of *John A. Hadden, Trustee v. United States*, No. 50038, this day decided.

JONES, *Chief Judge*, joins in the foregoing dissent.

FINDINGS OF FACT

The court, having considered the evidence, the stipulation of facts entered into between the parties, and the briefs and argument of counsel, makes findings of fact as follows:

FINDINGS RELATING TO CLAIM OF NATIONAL SURETY CORPORATION, NO. 419-52

1. The plaintiff, National Surety Corporation, is a corporation duly organized under the laws of the State of New York and is authorized to carry on the business of Surety in

the State of New York, all the States of the United States and the District of Columbia.

2. On or about September 1, 1950 Thomas Bryan and Associates, Inc., hereinafter referred to as the Contractor, duly entered into a contract with the United States of America, through the United States Atomic Energy Commission, hereinafter called the Government, for the construction of Group 138, Buildings and Facilities, TA-16, Project D, Los Alamos, New Mexico, known as Contract No. AT (29-1)-994 at an estimated price of $673,860, the price of which was adjusted by modification to $609,618.73.

3. At or about the time of the execution of said contract and in compliance with the Miller Act, 40 U. S. C. 270a, c. 642, Sec. 1, 49 Stat. 793, the Contractor, as Principal, and the plaintiff, as Surety, executed two bonds to the Government, each in the penal sum of $336,930, one of said bonds to secure the performance of said contract, and the other of said bonds to secure the payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract.

4. In consideration of premium in the sum of $6,096.18 and indemnity agreement dated on or about May 29, 1950, and written application dated on or about September 1, 1950, the plaintiff executed the aforesaid bonds, and under said application and indemnity agreement the Contractor agreed in part, as follows:

> If any such bond be given in connection with a contract, the Surety is hereby authorized, but not required, (a) to consent to any change in the contract or in the plans and specifications relating thereto; (b) from time to time to make or guarantee advances or loans for the purposes of the contract without the necessity of see-

ing to the application thereof, it being understood that the amount of all such advances or loans shall be conclusively presumed to be a loss hereunder; (c) in event of the abandonment, forfeiture or breach of the contract or the breach of any bond given for the performance thereof or in connection therewith or the failure, neglect or refusal to pay for labor or materials used in the prosecution of the contract, to take possession of the work under the contract and, at the expense of the Indemnitors, to complete the contract or cause the same to be completed or to consent to the completion thereof, and to take any other action which the Surety, in its sole discretion, may deem appropriate; and the Indemnitors hereby assign, transfer and set over to the Surety (to be effective as of the date of such bond, but only in the event of abandonment, forfeiture, breach, failure, neglect or refusal, as aforesaid) all of their rights under the contract, including their right, title and interest in and to (1) all sub-contracts let in connection therewith, (2) all machinery, plant, equipment, tools and materials which shall be upon the site of the work or elsewhere for the purposes of the contract, including all materials ordered for the contract, and (3) any and all sums due under the contract at the time of such abandonment, forfeiture, breach, failure, neglect or refusal, or which may thereafter become due, and the Indemnitors hereby authorize the Surety to endorse in the name of the payee and to collect any check, draft, warrant or other instrument made or isued in paymnet of any such sum and to disburse the procedes thereof.

5. The Contractor proceeded with the work as provided by the contract and prosecuted the same until on or about March 3, 1951, when the Government accepted the contract as completed.

6. The Government made payment to the Contractor in the sum of $501,617.26.

7. The Contractor was indebted to the Government in the sum of $7,083.13 arising out of the Contractor's operations under Contract No. AT (29-1)-994 as follows: $4,780.77 for miscellaneous small claims, and $2,302.36 cost of replacing certain vitrified clay pipe.

8. Thomas Bryan and Associates, Inc., the Contractor, is indebted to the Government in the amount of $45,429.58 for withholding taxes for the fourth quarter of 1950 and Federal Unemployment Taxes for the years 1949 and 1950, including interest to the date of filing of the bankruptcy petition, to wit, February 24, 1951. Check No. 825 payable to the Collector of Internal Revenue, drawn on The First National Bank in Houston, in the amount of $42,-106.26, was issued on January 31, 1951, but was returned on account of insufficient funds. The records of the Contractor showing the breakdown of said amount is appended to the stipulation of facts as Exhibit D.

9. Creditors of the Contractor who had furnished labor and materials in connection with the performance of the said contract were unpaid for their work and materials supplied in the prosecution of the contract work in the sum of $295,255.64 and made demand upon the plaintiff for the payment thereof and that by reason thereof the plaintiff was compelled to accept liability therefor and pay in accordance with its obligation of its said payment bond, sums aggregating $295,255.64 to the creditors of the Contractor in settlement of claims for labor and materials supplied to the Contractor in the prosecution of the work provided for in said contract, no part of which sum has been refunded or paid to the plaintiff by the Contractor or anyone else.

10. The First National Bank in Houston, of Houston, Texas, third party defendant in this case, also makes claim

to the unexpended balance on said contract upon an assignment to it from the Contractor of moneys due or to become due under the said contract executed on or about January 21, 1951, under the Assignment of Claims Act, 41 U. S. C. 15, 61 Stat. 501, 65 Stat. 41. A notice of said assignment was received by the plaintiff and was acknowledged as follows:

> Receipt is hereby acknowledged of the above notice and a copy of the above mentioned instrument of assignment. These were received at 9 A. M. on February 8, 1951 subject to a complete reservation of all our rights.

11. No action on the claim asserted herein has been taken by Congress or by any Department of the Government or in any judicial proceeding except as shown in findings 21 and 22, including the Tax Court of the United States, except that on or about March 29, 1951, on the application of John F. Lang as ancillary receiver for the Contractor in bankruptcy, a temporary injunction was issued in the District Court of the United States for the District of New Mexico enjoining and restraining C. R. McNeeley, Finance Officer of the Atomic Energy Commission, and J. A. Abbott, Disbursing Officer of the United States of America, from making any payments on account of any contracts with the said bankrupt otherwise than into the Registry of the said Court, or delivering any check on account of any such contract otherwise than into the Registry of said Court.

12. The third party defendant, First National Bank in Houston, is a national bank, duly organized under the Acts of Congress of the United States of America, with its principal place of business in Houston, Harris County, Texas.

13. On January 30, 1950, Thomas Bryan and Associates, Inc., a corporation, executed notice of assignment of accounts pursuant to Art. 260-1, Texas Civil Statutes, as follows:

THE STATE OF TEXAS }
COUNTY OF HARRIS }

NOTICE IS HEREBY GIVEN: That the undersigned has assigned and intends to assign to First National Bank of Houston, a national banking corporation domiciled in Houston, Harris County, Texas, whose mailing address is 201 Main Street, Houston 2, Texas, and the First National Bank of Santa Fe, New Mexico, one or more accounts receivable, as more particularly set forth in the assignment in writing, made, executed and delivered by said assignor to said bank, and in such other assignments as shall from time to time be made, executed and delivered by said assignor to said bank.

The mailing address of the assignor is M & M Building, Houston, Texas.

The legal residence of the assignor in the State of Texas is at Houston, Texas.

The principal office of the assignor in the State of Texas is at Houston, Texas.

Said assignor has only the following other places of business within the State of Texas: .....
....., Texas.

This notice of assignment shall be effective for a period of three years from its date.

IN WITNESS WHEREOF, the said assignor has executed these presents at Houston in the State of Texas, this Jan. 30, 1950.

THOMAS BRYAN AND ASSOCIATES, INC.
by s/s ROBERT W. HASTY, Treas.
by s/s CHARLES C. HEBING, V. P.

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, personally appeared Robert W. Hasty and Charles C. Hebing, known to me to be the person whose name is subscribed to the foregoing instrument in writing and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

IN WITNESS WHEREOF, I have hereto set my hand and seal of office this Jan. 30, 1950.

/s/ JAMES B. THOMAS
Notary Public in and for
Harris County, Texas.

This notice of assignment was filed of record in the office of the County Clerk of Harris County, Texas, on January 30, 1950, being instrument No. 220416, entered in the Chattel Mortgage Register, Vol. 410, Page 75.

14. The pertinent provisions of Article 260-1 of the Texas Civil Statutes are as follows:

Section 1. Definitions: In this Act unless the context otherwise requires:

(1) "Account" or "account receivable" means an existing or future right to the payment of money presently due, or to become due (a) under an existing contract; (b) which right to payment is not secured by a chattel mortgage, a conditional sale contract, or other instrument which may be filed for record in a public office of this or another state of the United States and which instrument was given at or before the time the account was assigned and reserves the title to, or creates, a lien upon, goods, the sale of which gave rise to the account; and (c) which right to payment is not represented by (A) a judgment, (B) a

negotiable instrument, or (C) a non-negotiable instrument which so represents the obligation that an assignee who takes possession of it takes rights superior to those of a prior assignee of the obligation who did not take possession of the instrument; and (d) the assignment of which right is not subject to special statutory provisions of the state or of the Federal Government relative to the rights of creditors of the assignor or to successive assignees from the assignor.

(2) "Assignee", "assignment", "assignor", and "debtor" are limited respectively to an assignee, assignment, assignor of, and debtor on an account receivable.

(3) "Contract" includes express contracts, written or oral, and implied contracts, such as an obligation to pay for goods received or services rendered without an express contract.

(4) "Assignment" means any transfer of an account, other than by operation of law, including but not limited to a transfer as security, the creation by agreement of a lien on an account, and sales of accounts.

Sec. 2. The assignment of any account or accounts may be protected by the execution and delivery by the assignor to the assignee of an instrument or instruments in writing, assigning such account or accounts and describing the account or accounts assigned with sufficient particularity to identify the same, and by the filing for record the "Notice of Assignment" as hereinafter provided for.

* * *

Sec. 6. Whenever any person, firm or corporation shall in good faith take a protected assignment of any account or accounts, which shall not have been satisfied, cancelled, or released by the assignor, all creditors of, and all subsequent assignees, purchasers and transferees of or from the assignor shall be conclusively deemed to

have received notice of such assignment, dating from the time of the filing for record of the notice of assignment hereinabove provided; and after such filing for record, no purchaser from the assignor, no creditor of any kind of the assignor, and no prior or subsequent assignee or transferee of the assignor, holding an assignment not protected, or holding an assignment under a notice of assignment subsequently filed for record, shall in any event have, or be deemed to have acquired, any right in the account or accounts so assigned or in the proceeds thereof, or in any obligation substituted therefor, superior to the rights therein of the assignee named in such prior protected assignment.

* * *

15. On December 22, 1950, the third party defendant (hereinafter sometimes referred to as the bank) loaned and paid over to said Thomas Bryan and Associates, Inc. the sum of $125,000 evidenced by its promissory note of said date; that there is a balance due on said note in the amount of $109,005.42 with interest at the rate of 5% per annum from December 22, 1950. The bank at various times between January 30, 1950 and February 23, 1951, loaned and advanced funds to Thomas Bryan and Associates, Inc., of which there remains unpaid the amount of $302,730.78.

16. On December 22, 1950 simultaneously with execution of the above described note, said Thomas Bryan and Associates, Inc., executed an assignment to the bank of Invoice No. H-285, Contract No. AT (29-1)-994 directed to United States Atomic Energy Commission, Office of Santa Fe Operations, Los Alamos, New Mexico, by said Thomas Bryan and Associates, Inc., dated December 18, 1950, in the amount of $161,902.33 as security for repayment of the above described note.

17. On January 21, 1951, the said Thomas Bryan and Associates, Inc., pursuant to the Assignment of Claims Act

of 1940 (Title 31, Sec. 203 (U.S.C.A.) and to the provisions of Article 24 (a) (b) of the aforesaid Contract No. AT (29-1)-994, assigned to the bank all moneys due and to become due to said Thomas Bryan and Associates, Inc. under said Contract, and authorized and directed defendant to pay to the order of the bank all sums payable to the defendant under said Contract, as the same became due thereunder, and gave the bank full power and authority to collect and receive same.

18. Notice of said Assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 17), together with a true copy of the instrument of assignment, was mailed to General Accounting Office, Washington, D. C., under date of January 21, 1951, receipt of which was acknowledged by O. L. Voorhees for Chief, Contract Service Section, General Accounting Office at 3:30 P. M. February 6, 1951; and

Notice of said assignment pursuant to the Assignment of Claims Act of 1940 described above (finding 17), together with a true copy of the instrument of assignment, was mailed to Treasury Disbursing Agent, Albuquerque, New Mexico, under date of January 21, 1951, receipt of which was acknowledged by J. A. Abbott, Regional Disbursing Office, at 9:00 A. M. on February 5, 1951; and

Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 17), together with a true copy of the instrument of assignment, was mailed to C. L. Tyler, Contracting Officer, Los Alamos, New Mexico, under date of January 21, 1951, receipt of which was acknowledged by James J. Rose, Acting Director, Of. of Engr. & Contr. on behalf of R. E. Cole, Contracting Officer, U. S. Atomic Energy Commission,

Los Alamos, New Mexico, at 2:30 P. M. on February 5, 1951; and

Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 17), together with a true copy of the instrument of assignment, was mailed to National Surety Corporation, Rusk Building, Houston 2, Texas, under date of January 21, 1951, receipt of which was acknowledged by A. J. Reid, Ass't Secretary on behalf of National Surety Corporation, 4 Albany Street, New York, New York, at 9:00 A. M. on February 8, 1951, as set forth in Paragraph 10.

Article 24 (a) (b), Assignment of Rights, of the aforementioned Contract, provides:

> (a) Claims for monies due or to become due the contractor from the Government under this contract may be assigned to a bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.
>
> (b) In the event of any such assignment the assignee shall file four signed copies of a written notice of the assignment, together with one copy of the instrument of assignment, with each of the following:
>
> (I) General Accounting Officer.
>
> (II) The Contracting Officer.
>
> (III) The surety or sureties upon the bond or bonds, if any, in connection with this contract.
>
> (IV) The officer designated in this contract to make payments thereunder.

19. Unpaid loans from the bank to Thomas Bryan and Associates, Inc., were in existence at the time of said assignment set forth in finding 17, and other loans to Thomas Bryan and Associates, Inc., were made by the bank thereafter, but no loan was so made at the time said assignment was executed.

20. Neither the plaintiff nor the First National Bank in Houston has made any assignment of their claim to the unexpended balance of said contract or the moneys due thereunder except to the extent that the facts stated in findings 21 and 22 may constitute an assignment by the plaintiff.

21. On February 9, 1953, the United States District Court for the Southern District of New York made an order approving the compromise between the Fidelity and Deposit Company of Maryland, National Surety Corporation and John F. Lang, as Trustee of Thomas Bryan and Associates, Inc., bankrupt.

22. Pursuant to this order, on February 9, 1953, John F. Lang, as Trustee, Receiver and Ancillary Receiver of Thomas Bryan and Associates, Inc., executed an assignment to the plaintiff, National Surety Corporation, of all of its rights against the defendant.

FINDINGS REATING TO CLAIM OF FIDELITY AND DEPOSIT COMPANY OF MARYLAND NO. 149-53

23. The plaintiff, Fidelity and Deposit Company of Maryland, is a corporation duly organized under the laws of the State of Maryland, and is authorized to carry on the business of Surety in all the states of the United States and the District of Columbia.

24. On or about November 29, 1949, Thomas Bryan and Associates, Inc., hereinafter referred to as the Contractor, duly entered into a contract with the United States of America, through the United States Atomic Energy Commission, hereinafter called the Government, for the construction of a steam and electric plant in Area TA-3, Los Alamos, New Mexico, known as Contract No. AT (29-1)-838, at an estimated price of $1,665,236.00, the final contract price of which was adjusted by modification to $1,705,295.55.

25. At or about the time of the execution of the said contract and in compliance with the Miller Act, 40 U. S. C. 270a, c. 642, Sec. 1, 49 Stat. 793, the Contractor, as Principal, and the plaintiff, as Surety, executed two bonds to the Government, each in the penal sum of $832,618.00, one of said bonds to secure the performance of said contract and the other of said bonds to secure the payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract.

26. In consideration of the premium in the sum of $16,652.36 and the application and indemnity agreement dated on or about December 1, 1949, the plaintiff executed the aforesaid bonds, and under said application and indemnity agreement the Contractor agreed, in part, as follows:

> The undersigned does or hereby do represent that the statements made herein as an inducement to the Fidelity and Deposit Company of Maryland (hereinafter called Company) to execute or procure the bond or bonds herein applied for, are true, and should the Company execute or procure said bond or bonds, does or do hereby agree, for the undersigned, the heirs, personal representatives and assigns of the undersigned, jointly and severally, as follows:

SECOND: to indemnify the Company against all loss, costs, damages, expenses and attorneys' fees whatever, and any and all liability therefor, sustained or incurred by the Company by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained.

THIRD: that the Company shall have the right, and is hereby authorized but not required:

(a) In the event of any abandonment or forfeiture of the contract guaranteed by said contract bond or of any breach of said contract bond, to take possession of the work under said contract, and at the expense of the undersigned to complete, or to contract for the completion of, the same, or to consent to the re-letting or completion thereof by the obligee in said contract bond;

(b) to adjust, settle or compromise any claim, demand, suit or judgments upon said bond, or bonds, or any of them, unless the undersigned shall request the Company to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Company, at the time of such request, cash or collateral satisfactory to it in kind and amount, to be used in paying any judgment or judgments that may be rendered, with interest, costs and attorney's fees. * * *

FOURTH: to assign, transfer and set over and does and or do hereby assign, transfer and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract, but only in the event of (1) any abandonment, forfeiture or breach of said contract, or of any breach of said bond or bonds, or any of them, or of any

other bond or bonds executed or procured by the Company on behalf of the undersigned; or (2) of any breach of the agreements herein contained; or (3) of a default in discharging such other indebtedness or liabilities when due; or (4) of any assignment by the undersigned for the benefit of creditors, or of the appointment, or trustee for the undersigned, whether insolvent or not; * * *

(b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof or additions thereto, or in or growing in any manner out of said bond or bonds, or any of them; * * *

(d) Any and all percentages retained on account of said contract and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; * * *

FIFTH: that liability hereunder shall extend to, and include the full amount of any and all sums paid by the Company in settlement or compromise, in good faith, of liability, loss, costs, damages, expenses and attorneys' fees, claims, demands, suits and judgment as aforesaid; an itemized statement thereof, sworn to by any officer of the company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned, in any claim or suits hereunder, and in any and all matters arising between the undersigned and the Company.

27. The Contractor proceeded with the work and prosecuted the same until February 23, 1951.

28. On February 23, 1951, the Contractor stopped work under said contract.

29. Upon the default of the Contractor, the Government relet the work for completion to E. C. Pritchett Co. under Contract No. AT (29-1)-1149 in the sum of $83,418.56, to Wills Electric Company under Contract No. AT (29-1)-1158, in the sum of $87,363.00 and to W. D. Gunnells Co. under Contract No. AT (29-1)-1188, in the sum of $21,840 in the total sum of $192,621.56.

30. The Contractor was indebted to the Government in the sum of $11,764.78 for miscellaneous items arising out of the Contractor's operations under Contract No. AT (29-1)-838 as follows:

Materials and Services furnished	$1,891.45
Rental for White Rock Housing assigned to contractor under this contract	9,459.40
Utilities furnished for contractor's office at Los Alamos (prorated between this contract and Contract No. AT (29-1)-994)	31.08
Rental for White Rock Housing held by contractor (prorated)	146.25
AEC communications service account (unpaid telephone bills prorated)	182.49
Medical services furnished by Los Alamos Medical Center to contractor's employees for job incurred injuries (prorated)	54.11

31. Thomas Bryan and Associates, Inc., the Contractor, is indebted to the Government in the amount of $45,429.58 for withholding taxes for the fourth quarter of 1950, and Federal Unemployment Taxes for the years 1949 and 1950, including interest to the date of the filing of the bankruptcy petition, to wit, February 24, 1951. Check No. 825 payable to the Collector of Internal Revenue drawn on the First National Bank in Houston in the amount of $42,106.26 was issued on January 31, 1951, but was returned on account of insufficient funds. The records of the contractor showing

the breakdown of said amount are appended to the stipulation of facts as Exhibit D.

32. The Government made payment to the Contractor in the sum of $1,434,992.60.

33. The Contractor was indebted to the Government in the sum of $7,083.13 arising out of the Contractor's operations under Contract No. AT (29-1)-994 as follows: $4,780.77 for miscellaneous small claims, and $2,302.36 cost of replacing certain vitrified clay pipe.

34. At the date of the Contractor's default, February 23, 1951, there had been assessed by the Government liquidated damages arising out of Contract No. AT (20-1)-838 in the amount of $63,075.00, computed as follows:

(1) No. 1 Turbo-Generator Unit to be completed November 1, 1950; delay from November 2, 1950 to February 23, 1951.

114 days at $400 per day $45,600

(2) No. 2 Turbo-Generator Unit to be completed December 1, 1950; delay from December 2, 1950 to February 23, 1951.

84 days at $200 per day $16,800

(3) Telephone cable facilities to be completed August 1, 1950; were completed August 28, 1950.

delay of 27 days at $25 per day 675

Total $63,075

The total liquidated damages assessed by the Government against the Contractor on Contract No. AT (29-1)-838 in the amount of $103,475.00 for delays in the completion of said contract were computed as follows:

(1) The No. 1 Turbo-Generator Unit was accepted under contract AT (29-1)-1149 as of April 25, 1951. This is an over-run in time of 175 days (Nov. 2, 1950 to April 25, 1951). The liquidated damages for this unit were assessed for 175 days at $400.00 per day amounting to a total of $70,000.00.

(2) The No. 2 Turbo-Generator Unit was accepted under Contract AT (29-1)-1149 as of May 14, 1951. This is an over-run in time of 164 days (Dec. 2, 1950 to May 14, 1951). The liquidated damages for this unit were assessed for 164 days at $200.00 per day amounting to a total of $32,800.00.

(3) The telephone cable facilities were completed as of August 28, 1950. This is an over-run in time of 27 days (Aug. 2, 1950 to Aug. 28, 1950). The liquidated damages for this installation were assessed for 27 days at $25.00 per day amounting to a total of $675.00.

35. Creditors of the Contractor who had furnished labor and materials in connection with the performance of the said contract were unpaid for their work and materials supplied in the prosecution of the contract work in the sum of $341,769.86 and made demand upon the plaintiff for the payment thereof and that by reason thereof the plaintiff was compelled to accept liability therefor and pay, in accordance with its obligation of its said payment bond, sums aggregating $341,769.86 to the creditors of the Contractor in settlement of claims for labor and materials supplied the Contractor in the prosecution of the work provided for in said contract, no part of which sum has been refunded or paid to the plaintiff by the Contractor or anyone else.

36. No action on the claim asserted herein has been taken by Congress, or by any Department of the Government or

in any judicial proceeding except as shown in findings 45 and 46, including the Tax Court of the United States, except that on or about March 29, 1951 on the application of John F. Lang, as ancillary receiver for the Contractor in bankruptcy, a temporary injunction was issued in the District Court of the United States for the District of New Mexico enjoining and restraining C. R. McNeeley, Finance Officer of the Atomic Energy Commission, and J. A. Abbott, Disbursing Officer of the United States of America, Atomic Energy Commission from making any payments on account of any contracts with the said bankrupt otherwise than into the Registry of the said Court, or delivering any check on account of any such contract otherwise than into the Registry of said Court.

37. The Intervenor in this case, First National Bank in Houston, is a national bank, duly organized under the Acts of Congress of the United States of America, with its principal place of business in Houston, Harris County, Texas.

38. The Intervenor, First National Bank in Houston, at various times between January 30, 1950 and February 23, 1951, loaned and advanced funds to Thomas Bryan and Associates, Inc., of which there remains unpaid the amount of $302,730.78.

39. On January 30, 1950, Thomas Bryan and Associates, Inc. executed notice of assignment of accounts pursuant to Art. 260-1, Texas Civil Statutes. (See finding 13.)

40. On January 21, 1951, the said Thomas Bryan and Associates, Inc., pursuant to the Assignment of Claims Act of 1940 (Title 31, Sec. 203, U.S.C.A.) and to the provisions of Article 24 (a) (b) of the aforementioned Contract No. AT (29-1)-838, assigned to the Intervenor all moneys due and to become due to said Thomas Bryan and Associates, Inc.

under said Contract and authorized and directed defendant to pay to the order of Intervenor all sums payable by the defendant under said Contract, as the same become due thereunder, and gave Intervenor full power and authority to collect and receive same.

41. Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 40), together with a true copy of the instrument of assignment, was mailed to the General Accounting Office, Washington, D. C. under date of January 21, 1951, receipt of which was acknowledged by O. L. Voorhees for Chief, Contract Service Section, General Accounting Office at 10:00 A. M. February 6, 1951; and

Notice of said assignment pursuant to the Assignment of Claims Act of 1940 described above (finding 40), together with a true copy of the statement of assignment, was mailed to Treasury Disbursing Agent, Albuquerque, New Mexico, under date of Januray 21, 1951, receipt of which was acknowledged by J. A. Abbott, Regional Disbursing Office, at 9:00 A. M. on February 5, 1951; and

Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 40), together with a true copy of the instrument of assignment, was mailed to C. L. Tyler, Contracting Officer, Los Alamos, New Mexico, under date of January 21, 1951, receipt of which was acknowledged by James J. Rose, Acting Director, Of. of Engr. & Constr. on behalf of R. E. Cole, Contracting Officer, U. S. Atomic Energy Commission, Los Alamos, New Mexico, at 2:30 P. M. on February 5, 1951; and

Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 40), together with a true copy of the instrument of assignment, was

mailed to Fidelity and Deposit Company of Maryland, City National Bank Building, Houston 2, Texas, under date of January 21, 1951, receipt of which was acknowledged by E. B. McCahan, Jr., Vice-President, on behalf of Fidelity and Deposit Company of Maryland, 606 Fidelity Building, Baltimore 3, Maryland, at 2:00 P. M. on February 5, 1951, subject to the reservation by the plaintiff of all its rights, equity or priorities whether by agreement, subrogation or common law or statute law.

Article 24 (a) (b), Assignment of Rights, of the aforementioned General Contract, provides:

> (a) Claims for monies due or to become due the contractor from the Government under this contract may be assigned to a bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.
>
> (b) In the event of any such assignment the assignee shall file four signed copies of a written notice of the assignment, together with one copy of the instrument of assignment, with each of the following:
>
> (I) General Accounting Office.
>
> (II) The Contracting Officer.
>
> (III) The surety or sureties upon the bond or bonds, if any, in connection with this contract.
>
> (IV) The officer designated in this contract to make payments thereunder.

42. The pertinent provisions of Article 260-1 of the Texas Civil Statutes are set forth in finding 13.

43. Unpaid loans from Intervenor Bank to Thomas Bryan and Associates, Inc. were in existence at the time of said assignment set forth in finding 40, and other loans to Thomas Bryan and Associates, Inc. were made by Intervenor Bank but no loan was so made at the time said assignment was executed.

44. Neither the plaintiff nor the intervenor have made any assignment of their claims to the unexpended balance on said contract or the money due thereunder except to the extent that the facts stated in findings 45 and 46 may constitute an assignment by the plaintiff.

45. On February 9, 1953, the United States District Court for the Southern District of New York made an order approving the compromise between the Fidelity and Deposit Company of Maryland, National Surety Corporation and John F. Lang, as Trustee of Thomas Bryan and Associates, Inc., bankrupt.

46. Pursuant to the above order, on February 9, 1953, John F. Lang, as Trustee, Receiver and Ancillary Receiver of Thomas Bryan and Associates, Inc., executed an assignment to the plaintiff, Fidelity and Deposit Company of Maryland of all his rights against the defendant.

FINDINGS, BASED UPON STIPULATION, OF GENERAL APPLICATION TO CLAIMS NOS. 419-52 AND 419-53

47. On June 16, 1954, the plaintiffs National Surety Corporation and Fidelity and Deposit Company of Maryland and the third party defendant, intervenor, First National Bank in Houston, submitted to the Attorney General an offer to compromise these actions insofar as the United States is concerned. Said offer of compromise was on September 7, 1954, duly accepted.

48. Plaintiffs and First National Bank in Houston agree and the court finds that defendant is justly entitled to the sum of $45,429.58 as taxes owing to defendant by the bankrupt contractor, Thomas Bryan and Associates, Inc., said taxes to be apportioned between the amounts owing by defendant on Contracts No. AT (29-1)-838 and No. AT (29-1)-994, and that judgment may be entered for defendant herein in said amount and set off against the amount due and owing by defendant on account of said contracts, as hereinafter set forth.

49. In addition, plaintiffs and First National Bank in Houston agree to waive their claims to recovery of (1) any part of the completion costs of Contract No. AT (29-1)-838 in the amount of $192,621.56, (2) $675.00 assessed by defendant as liquidated damages on Contract No. AT (29-1)-838, (3) $7,083.13, constituting miscellaneous charges arising out of the contractor's operations under Contract No. AT (29-1)-994, and (4) $11,764.78, constituting miscellaneous charges arising out of contractor's operations under Contract No. AT (29-1)-838.

50. Defendant agrees and the Court finds that there is due and unpaid, before deduction of the aforesaid $45,429.58 for taxes, on Contract AT (29-1)-838, the sum of $65,-241.61, and on Contract No. AT (29-1)-994, the sum of $100,918.34, totalling $166,159.95. Defendant accordingly shall make a net aggregate payment of the sum of $120,730.37, which results from deducting said sum of $45,429.58 due and owing to defendant for taxes from said sum of $166,159.95 being the balance due and owing by defendant on account of said contracts. The defendant shall hold said net sum of $120,730.37 pending the determination in these proceedings of the respective rights of the plaintiffs and the First National Bank in Houston

and the entry of an appropriate judgment by the Court determining such rights.

51. Plaintiffs, the First National Bank in Houston, and defendant have waived and abandoned any and all other claims heretofore asserted against each other touching any and all matters involved in these cases and each has agreed to accept the amounts hereinabove set forth in full settlement hereof.

52. This compromise is in no way related to or concerned with the income or other taxes to which plaintiff or the First National Bank in Houston are now or may in the future become liable as a result of this settlement, or otherwise.

53. The parties have made this settlement and stipulations for the purpose of enabling the Court, after it determines the respective rights of the plaintiffs and First National Bank in Houston, to (1) enter judgment for the party or parties determined to have the superior rights, and against the defendant, in the sum of $166,159.95 in full settlement of all claims set forth in plaintiffs' and third party defendant, intervenor's petitions, as above set forth, (2) enter judgment for the defendant and against the party or parties determined to have the superior rights, in the sum of $45,429.58 in full settlement of all claims set forth in defendant's counterclaim, as hereinabove set forth, (3) set off the liability of the party or parties determined to have the superior rights against defendant's liability, and to enter judgment in favor of the party or parties deemed to have the superior rights and against defendant for the net difference of $120,730.37. The parties agreed that in the event the stipulations are rejected in whole or in part by the Court, the entire stipulations should be void and of no effect whatsoever.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs National Surety Corporation and Fidelity and Deposit Company of Maryland are entitled to recover, and it is therefore adjudged and ordered that the National Surety Corporation may recover of and from the United States the sum of seventy-three thousand three hundred twenty-six dollars and thirty-nine cents ($73,326.39), and that the Fidelity and Deposit Company of Maryland may recover of and from the United States the sum of forty-seven thousand four hundred three dollars and ninety-eight cents ($47,403.98).

The petition of intervenor First National Bank in Houston is dismissed.

IN THE UNITED STATES COURT OF CLAIMS

No. 50038

(Decided July 12, 1955)

JOHN A. HADDEN, AS TRUSTEE IN BANKRUPTCY OF MANUFACTURERS TRADING CORPPORATION AND MANUFACTURERS DISCOUNT CORPORATION v. THE UNITED STATES

CONDENSER SERVICE & ENGINEERING CO., INC., ET AL., INTERVENORS

Mr. Theodore B. Wolf for the plaintiff. *Mr. Israel Akselrod* and *Messrs. Zalkin & Cohen* were on the briefs.

Mr. Harry I. Rand for the intervenors. *Mr. Solomon Dimond* was on the briefs.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Carl Eardley* was on the brief.

ON INTERVENORS' MOTION FOR A REHEARING

MADDEN, *Judge*, delivered the opinion of the court:

In this case the plaintiff is the trustee in bankruptcy for a financial institution which loaned money to the contractor, taking as security an assignment of the contractor's rights to receive payments from the Government for the performance of the contract. The intervenors are laborers and materialmen who furnished labor and materials to the contractor and have not been paid. The Government withheld a considerable sum which was otherwise due the contractor. The intervenors assert a right in that money superior to the right of the plaintiff.

The plaintiff sued for the amount withheld by the Government. The Government filed counterclaims for a total amount greatly in excess of the amount which it withheld. In several other cases brought by the same plaintiff, Nos. 50115, 49884, 48867, 413-52 and 49831, decided on April 5, 1955, the Government filed most of the same counterclaims, and the court held that the counterclaims were not valid as against the claims there asserted, except to the extent that they were used up as credits in favor of the Government in that case. The outcome of those cases was a judgment in favor of the plaintiff trustee in bankruptcy for $303,156.44. That judgment has now become final. The sum admittedly withheld by the Government in the instant case is some $66,000 larger than the amount of any counterclaims by the Government now on file and not already dismissed.

In our decision in the instant case, we held that the Government was not a mere stakeholder, and that therefore the principle announced in *Royal Indemnity Co. v. United States,* 117 C. Cls. 736, was not applicable. But, by our decision dismissing the counterclaims in the plaintiff's other cases referred to above, we made of the Government a mere stakeholder. In that situation, this court's decision in *Royal Indemnity Co. v. United States, supra,* the Supreme Court's dictum in *United States v. Munsey Trust Company,* 332 U.S. 234, recognizing its earlier decision in *Henningsen v. United States Fidelity and Guaranty Co.,* 208 U. S. 404, as well as numerous other decisions of this and other Federal courts, show that we should recognize the rights of these intervenors. In the cases referred to above, the plaintiff was a surety company, asserting rights derived from its payment of laborers and materialmen. If this right is enforcible, the laborers and materialmen, in whose shoes the surety

in those cases stood, must have had rights. *Greenville Sav. Bank v. Lawrence,* 76 Fed. 545 (C.C.A. 4); *In re P. McGary & Son,* 240 Fed. 400 (C.C.A. 7); *Belknap Hardware & Mfg. Co. v. Ohio River C. Co.,* 271 Fed. 144 (C.C.A. 6); *American Surety Co. v. Westinghouse Electric Co.,* 75 F. 2d 377 (C.C.A. 5) affirmed 296 U. S. 133; and *Martin v. National Surety Co.,* 85 F. 2d 135 (C.C.A. 8), affirmed, 300 U. S. 588, are other Federal court cases in which laborers and materialmen, or sureties who have paid them, are held to have an equitable priority in money owed by the United States to a contractor.

The intervenors' right is a right to the money, if any, owing by the United States to the contractor. If, as the litigation proceeds, it should develop that there is no such money, the intervenors will not be entitled to anything.

The motion of intervenors for a rehearing is granted, and the order contained in the opinion of April 5, 1955, granting plaintiff's motion for judgment on the pleadings dismissing the petition in intervention is vacated.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

LARAMORE, *Judge,* dissenting:

When this case was before the court on plaintiff's motion for judgment on the pleadings dismissing intervenor's petition, the United States was not a more stakeholder, and it was not necessary to express an opinion on the correctness of *Royal Indemnity Company v. United States,* 117 C. Cls. 736. But now the United States may be a stakeholder of about $66,000 and, if so, the *Royal Indemnity* case is indistinguishable. I believe that the *Royal Indemnity* case

should be overruled. I fail to see how the laborers and materialmen have any standing to sue in this court. Their claim is against the contractor, not the United States.

It is true that the Supreme Court held in *Henningsen v. United States Fidelity and Guaranty Company of Baltimore, Maryland,* 208 U. S. 404, that the surety on a payment bond had an equitable priority to the retained percentages where the bank and the surety were both asserting equitable claims. The United States was not a party to that suit and the District Court had jurisdiction as between the private parties under their general jurisdiction. It is also not clear from that decision what rights the surety was "subrogated" to. The cases relied upon by the majority, except *Munsey Trust, infra,* which I do not believe supports the majority, were all decided before the amendment to the Assignment of Claims Act in 1940, 31 U. S. C. § 203, 54 Stat. 1029, and the question of this court's jurisdiction was not involved. Also, the United States was not involved in those suits because it had already paid the money to the party it believed entitled thereto, except in the case of *Greenville Sav. Bank v. Lawrence, supra,* where the United States withheld money, pursuant to the contract, for no other purpose than the payment of laborers and materialmen.

It is also relevant to note that *Prairie State Bank v. United States,* 164 U. S. 227, was not before this court under our present jurisdictional act, but rather by reference under section 1063 of Revised Statutes.

In this case the plaintiff, trustee for the financial institution, is not asserting a mere equitable priority, but rather is asserting a valid legal claim under the Assignment of Claims Act as amended in 1940, supra. This amendment was enacted to encourage the private financing of Government contracts and should be so construed. *Central Bank*

v. United States, 345 U.S. 639, 646. The United States could properly and safely pay the funds to the holder of the valid assignment without subjecting itself to double liability. See *Martin v. National Surety Co., et al.,* 300 U. S. 588, and the cases cited for the proposition that the Act was for the protection of the Government and was to prevent the Government from becoming embroiled in disputes between the contractor and its creditors. The United States does not have to concern itself with the question of which person is ultimately entitled to money, it can pay the holder of a valid assignment under the Assignment of Claims Act, *supra.* But on the question of which party is ultimately entitled to the money see the *Coconut Grove Exchange Bank v. New Amsterdam Casualty Co.,* 149 F. 2d 73, and *General Casualty Co. of America v. Second National Bank of Houston,* 178 F. 2d 679, in which cases it was held that the financial institution has the superior claim over the surety on a payment bond by reason of the passage of the 1940 amendment to the Assignment of Claims Act, *supra.* Obviously, the majority opinion is in direct conflict with these cases.

The laborers and materialmen and their subrogees have no enforceable rights against the United States. *United States v. Munsey Trust Co., Receiver,* 332 U. S. 234. Having no rights against the United States, the intervenors are in the position of asking this court to litigate the rights of private parties over which this court has no jurisdiction. *United States v. Sherwood,* 312 U. S. 584, and the cases there cited. If the laborers and materialmen have a superior right against the plaintiff *inter sese* they may prosecute that action in the proper forum.

I would overrule intervenors' motion.

SEC. 203. ASSIGNMENTS OF CLAIMS VOID

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

[ASSIGNMENT OF CLAIMS ACT OF 1940]

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: ***Provided,***

1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of

1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with—

(a) the contracting officer or the head of his department or agency;

(b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and

(c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940, as amended, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department, or agency thereof, whether arising

from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the resident, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract, or- (4) taxes, social-security contributions, or the

withholding or nonwithholding of taxes or social-security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this Act, as amended, shall be deemed to affect or impair rights or obligations heretofore accrued. [R. S. sec. 3477; Acts of May 27, 1908, c. 206, 35 Stat. 411; Oct. 9, 1940, c. 779, sec. 1, 54 Stat. 1029, as amended by Act of July 26, 1947, 61 Stat. 501 and Act of May 15, 1951, P. L. 30, 82nd Cong., 1st Sess.]

INDEX

	Page
Opinion below	1
Jurisdiction	1
Interest of the United States	2
Statutes involved	3
Statement	3
Discussion	9
Conclusion	14
Appendix	15

CITATIONS

Cases:

Central Bank v. *United States*, 345 U. S. 639	11
Coconut Grove Exchange Bank v. *New Amsterdam Casualty Co.*, 149 F. 2d 73	8, 13, 14
General Casualty Co. v. *Second National Bank of Houston*, 178 F. 2d 679	9, 13, 14
Henningsen v. *United States Fidelity and Guaranty Co.*, 208 U. S. 404	8
MacEvoy Co. v. *United States*, 322 U. S. 102	12
Martin v. *National Surety Co.*, 300 U. S. 588	11
Prairie State Bank v. *United States*, 164 U. S. 227	8
Standard Insurance Co. v. *United States*, 302 U. S. 442	12
Town of River Junction v. *Maryland Casualty Co.*, 110 F. 2d 278, certiorari denied, 310 U. S. 634, 133 F. 2d 57	12, 13, 14
United States v. *Munsey Trust Co.*, 332 U. S. 234	8, 10, 12

Statutes:

Assignment of Claims Act of 1940, as amended May 15, 1951, 54 Stat. 1029, 65 Stat. 41, 31 U. S. C. 203, Section 1	2, 3, 5, 8, 10, 11, 16
Miller Act, 49 Stat. 793, 40 U. S. C. 270a (a), Section 1 (a)	3, 4, 12, 18
R. S. Section 3477	3, 15

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 445

THE FIRST NATIONAL BANK IN HOUSTON,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims dated July 12, 1955 (Pet. App. 15–24) is reported at 133 F. Supp. 381. The findings of fact and conclusion of law of that court (Pet. App. 24–48) are not yet reported.

JURISDICTION

The judgment of the United States Court of Claims was entered on July 12, 1955. The petition for a writ of certiorari was filed October 4, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

INTEREST OF THE UNITED STATES

This petition raises the question of whether certain funds concededly owed to a bankrupt contractor by the United States should be awarded to the contractor's sureties or to the bank to which he assigned these funds. Owing to the particular circumstances of the case and to the procedure adopted by all parties in order to minimize the issues, the United States has no financial interest in the outcome of this particular case (see *infra,* pp. 6–8).

At this time, we do not know and thus cannot state what the interests of the Government would be in a situation in which it was not merely a stakeholder, but had various possible claims and set-offs against the funds in its hands. In such cases, the relative priorities of surety or bank might substantially affect the ultimate rights of the Government. Obviously many complex variables are potentially involved. No abstract rule can be properly formulated to cover every case in which surety and bank are disputing their relative priorities to amounts owing under Government contracts.

Indeed, the basic problems inherent in this type of litigation, involving the proper interpretation of the Assignment of Claims Act of 1940 (App. *infra,* pp. 16–18), begin to emerge only when the dispute concerns not only the rights of the bankrupt contractor's surety and assignees, but the

varied claims and set-offs of the Government. So far as the United States is concerned, this Court should not, we submit, review these problems on the basis of a record which fails to present the indispensable concrete factual background necessary to determine the interests of the Government.

Thus, we oppose the granting of the petition for a writ of certiorari, because (1) the case does not constitute a proper vehicle for an authoritative determination of the broad underlying issues; (2) the limited issue presented appears to have been correctly decided; and (3) contrary to petitioner's contention, no true conflict of decisions is involved.

STATUTES INVOLVED

In pertinent part, the following statutes are set forth in the Appendix, *infra,* at pp. 15–19: Section 3477 of the Revised Statutes (App. *infra,* p. 15); the Assignment of Claims Act of 1940, as amended, 54 Stat. 1029, 65 Stat. 41, 31 U. S. C. 203 (App. *infra,* pp. 16–18); and Section 1 (a) of the Miller Act, 49 Stat. 793, 40 U. S. C. 270a (a) (App. *infra,* pp. 18–19).

STATEMENT

Two surety companies, after discharging a defaulting contractor's obligations to laborers and material men pursuant to payment bonds, brought suits in the United States Court of

Claims asserting subrogation and other rights to the unpaid balance owed by the United States to the contractor. Petitioner, the First National Bank in Houston, became a party to these suits, claiming rights under an assignment given by the contractor to secure loans from the bank. During the litigation the government reached an agreement with all three claimants as to the net amount finally owing to the contractor, and thereafter was relegated to the position of a stakeholder. The Court of Claims held that the subrogation rights of the surety companies were superior to the rights of petitioner, and on July 12, 1955, entered judgment in favor of the sureties.

The facts relating to the litigation may be summarized as follows:

1. *The contracts involved.* In November 1949, Thomas Bryan and Associates, Inc. (the "contractor") contracted with the Atomic Energy Commission for the construction of a steam and electric plant. The surety bonds required by Section 1 (a) of the Miller Act (App. *infra*, pp. 18–19) were furnished by the Fidelity and Deposit Company of Maryland. (Fdgs. 24–26, Pet. 36.) About a year later, in September 1950, the contractor entered into a second contract with the Atomic Energy Commission. The surety on this contract was the National Surety Corporation (Fdgs. 1–3, Pet. 24–25.)

On January 30, 1950, the contractor made a general assignment of its accounts receivable to petitioner pursuant to the provisions of the Texas Civil Statutes (Fdg. 13, Pet. 29). On January 21, 1951, the contractor assigned to petitioner its claims under the two Atomic Energy Commission contracts in compliance with the provisions of the Assignment of Claims Act of 1940 (App. *infra*, pp. 16–18) (Fdg. 17, Pet. 32–33).

On March 3, 1951, the Government accepted the September 1950 contract as completed (Fdg. 5, Pet. 26). The adjusted price for the contract amounted to $609,618.73; the Government paid the contractor $501,617.26 (Fdgs. 2, 6, Pet. 25, 26). The unpaid balance on this contract thus amounted to $108,001.47, and after the deduction of $7,083.13, representing claims of the Government against the contractor arising out of the inadequate performance of the contract (Fdg. 7, Pet. 27),[1] to $100,918.34 (Fdg. 50, Pet. 46). The surety under this contract, National Surety Corporation, had to pay outstanding claims of laborers and material men in the amount of $295,255.64 (Fdg. 9, Pet. 27).

On February 23, 1951, the contractor stopped work on the November 1949 contract. The Government relet the contract at a cost of $192,621.56.

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[1] The contractor also was indebted to the Government in the amount of $45,429.58 for withholding taxes (Fdg. 8, Pet. 27).

(Fdgs. 27–29, Pet. 38–39.) The Government paid the contractor $1,434,992.60 of the adjusted price of $1,705,295.55 (Fdgs. 24, 32, Pet. 36, 40). The unpaid balance thus amounted to $270,302.95. Apart from the cost of reletting the contract and the withholding taxes referred to above (*supra*, fn. 1), the Government asserted additional miscellaneous claims in the amount of $11,764.78 (Fdg. 30, Pet. 39), and liquidated damages for the delay in the construction of two turbo-generator units and of telephone facilities. These liquidated damages amounted to $63,075.00, if computed as of the day of the contractor's default, and to $103,475.00, if computed as of the day of completion, including such damages for the delay in the completion of the telephone facilities amounting to $675.00 (Fdg. 34, Pet. 40–41). Fidelity and Deposit Company of Maryland, the surety on this contract, had to disburse $341,769.86 to laborers and material men who had not been paid (Fdg. 35, Pet. 41).

2. *The proceedings below.* The two sureties brought two separate actions in the Court of Claims (Nos. 419–52 and 149–53) [2] for the unpaid balances on the two contracts, claiming to be entitled to those sums both by way of subrogation and

[2] National Surety Corporation, the surety under the September 1950 contract, filed Petition No. 419–52 (R. 1–8). Fidelity and Deposit Company of Maryland, the surety under the November 1949 contract, filed Petition No. 149–53 (R. 53–62).

by express assignment. Petitioner, the First National Bank in Houston, claiming under its express assignments, joined both proceedings.[3] After the consolidation of the two proceedings (R. 99), all parties concerned, *i. e.,* the surety companies, the bank, and the United States, entered into a Stipulation of Facts and Stipulation of Settlement (R. 101–178).

Pursuant to the latter, the parties agreed that there remained due and unpaid on the November 1949 contract a net amount of $65,241.61[4] and on the September 1950 contract a net amount of $100,918.34,[5] totalling $166,159.95, and that the United States was entitled to a credit of $45,429.58, representing withholding taxes owed by the contractor to the Government.[6] Agreement having been reached on the amount of the liability of the United States, *i. e.,* $120,730.37, it was stipulated that the United States should hold this sum:

> * * * pending the determination in these proceedings of the respective rights of the

[3] In No. 419–52 petitioner filed a petition and answer (R. 13); in No. 149–53 it submitted a formal petition for leave to intervene before it filed its petition and answer (R. 67, 70).

[4] *I. e.*, the unpaid balance of $270,302.95 less $192,621.56 completion cost, $11,764.78 miscellaneous charges, and $675.00 liquidated damages (cf. *supra*, pp. 5–6 and R. 172–173).

[5] Cf. *supra*, p. 5 and R. 170–171.

[6] Cf. *supra*, p. 5, fn. 1, and R. 170–171.

> plaintiffs and the First National Bank in Houston and the entry of an appropriate judgment by the Court determining such rights. [R. 173.]

The stipulation finally recited that it was made for the purpose of enabling the court to determine the respective rights of the sureties and the bank and that judgment should be entered for the party or parties determined to have the superior right (R. 174). The United States accordingly filed a memorandum in the Court of Claims stating that it would not file a brief since the controversies had been settled in so far as it was concerned (R. 181).

3. *The judgment below.* The Court of Claims decided in favor of the sureties (Pet. 15–24). In so holding, it relied on decisions of this Court, such as *Prairie State Bank* v. *United States,* 164 U. S. 227; *Henningsen* v. *United States Fidelity and Guaranty Co.,* 208 U. S. 404; *United States* v. *Munsey Trust Co.,* 332 U. S. 234, which recognize that, usually, the equities of a surety are superior to the rights of a money lender acquired by way of assignment (Pet. 16–21). The Court of Claims concluded that the Assignment of Claims Act of 1940 (App. *infra,* pp. 16–18) was not designed to, and did not affect, this generally recognized order of priority (Pet. 20–21), although assuming (Pet. 24) that its decision conflicted with the view taken by the Fifth Circuit in *Coconut Grove Exchange Bank* v. *New*

Amsterdam Casualty Co., 149 F. 2d 73, and *General Casualty Co.* v. *Second National Bank of Houston*, 178 F. 2d 679.

The opinion of the Court of Claims states: "it does not affirmatively appear in this case whether or not the money borrowed from the bank was used in the performance of these contracts, and, if so, which of the two" (Pet. 20–21; cf. Fdg. 19, Pet. 35 and Fdg. 43, Pet. 45). Petitioner appears to challenge the accuracy of this statement, asserting that the "record here is clear that the bank made the loans to and advanced the funds to the contractor to assist and enable it to carry on and perform its contracts with the [Government]" (Pet. 7). However, petitioner gives no record reference to support its assertion; no finding to this effect was made; and the record designated by petitioner for certification to this Court contains neither evidence nor fact stipulation to sustain this claim.

DISCUSSION

We submit that the petition for a writ of certiorari should be denied. The case does not appear to be the proper vehicle for determining the effect of the Assignment of Claims Act on the relative rights of surety and bank. Furthermore, the decision below appears to be correctly decided in accord with controlling precedent,[7] and there is no true conflict.

[7] Cf. *supra*, p. 8.

1. *The instant case does not present a proper vehicle to determine the effect of the Assignment of Claims Act.* As already shown, the United States has no financial stake in the outcome of this particular litigation. Ordinarily, this circumstance would lead us to refrain from taking a position as to whether or not the petition for a writ of certiorari should be granted. These normally applicable considerations, however, do not apply in this area of the law where all depends upon the nature and origin of the right claimed and upon the person who presents it. Cf. *United States* v. *Munsey Trust Co.*, 332 U. S. 234.

The instant case is unique and unrepresentative because it does not encompass the varied claims of the Government against the parties and their predecessors in interest, and the issues of the relative priorities between surety, bank, and Government. A decision here would be of extremely limited precedential value and would solve only part of the complex problems which are normally presented in this type of litigation. Indeed, in view of the highly technical legal rules here involved, it is quite possible that the relative rights of the parties were substantially affected by the stipulations of fact and settlement, and by the resulting absence of any claims of the United States.

Moreover, the effect, if any, of the Assignment of Claims Act of 1940, as amended (App. *infra*,

pp. 16–18), on the relative rights of sureties and assignees should not, we submit, be decided in a case in which the United States has merely an academic interest.

2. *The decision below is not in conflict with the rulings of this Court or of the circuits.* Contrary to petitioner's assertion, the holding of the Court of Claims does not conflict, either as to holding or in principle, with *Central Bank* v. *United States,* 345 U. S. 639, or *Martin* v. *National Surety Co.,* 300 U. S. 588, the two decisions of this Court cited by petitioner as being in "direct conflict" (Pet. 2) with the "opinion" of the court below. The *Central Bank* case did not involve any question of the rights of a surety, and this Court, in its opinion, did not consider this problem. Although the *National Surety* case involved a somewhat different type of fact situation, it, like the decision below, sustained the surety's contention that its equity was superior to that of a creditor who had advanced money to a contractor with knowledge of the surety's rights.

Likewise, the other decisions cited by petitioner (Pet. 2) are clearly distinguishable on the facts. They appear to be cited primarily for the unchallenged general proposition that the Assignment of Claims Act (App. *infra,* pp. 16–18) is to be interpreted so as to carry out its purpose, *i. e.,*

to encourage and facilitate the private financing of Government contracts.[8]

Furthermore, as this Court indicated in *United States* v. *Munsey Trust Co.*, 332 U. S. 234, the relative precedence of the rights of surety, assignee, and the Government is not absolute, but depends to a large extent upon the origin and nature of the right claimed and on the party which asserts it. As we read the decisions of the Fifth Circuit, they do not purport to hold that the assignee-bank's rights always have priority over those of the surety. They are limited to a very narrow issue, and hold specifically that where, prior to his default, a contractor assigns *progress payments* under a contract to a bank as security for a loan to be used for the specific purpose of payment of the laborers and material men, and where the bank can show[9] that no part of this loan was diverted from such payments to the laborers and material men under that particular contract, the bank's rights are not subordinated to the surety's equities; the reason being that the surety got the full benefit of the arrangement.

---

[8] Of course similar considerations govern the construction of the Miller Act (App. *infra*, pp. 18–19), which was designed to give protection and security to those who furnish labor and materials for public works. *Standard Insurance Co.* v. *United States*, 302 U. S. 442, 444; *MacEvoy Co.* v. *United States*, 322 U. S. 102, 104.

[9] *Town of River Junction* v. *Maryland Casualty Co.*, 133 F. 2d 57, 58 (C. A. 5).

Town of River Junction v. *Maryland Casualty Co.*, 110 F. 2d 278, 281, certiorari denied, 310 U. S. 634, 133 F. 2d 57; indeed, *General Casualty Co.* v. *Second National Bank of Houston*, 178 F. 2d 679, 680 (C. A. 5), states specifically that in other situations the bank's rights would be subordinate to those of the surety.[10]

Petitioner, moreover, has failed to show that it even comes within the narrow confines of the Fifth Circuit rule. Nothing in the present case indicates that the funds in the hands of the United States represented progress payments. Furthermore, as the Court of Claims specifically pointed out in its opinion (Pet. 20–21; see *supra*, p. 9), there was no showing that the funds advanced by petitioner to the contractor were used by it to pay the laborers and material men on the two contracts here involved.[11]

---

[10] *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Co.*, 149 F. 2d 73 (C. A. 5) appears to have a somewhat broader scope. However, this opinion must be read against the background of the far more limited holdings of *Town of River Junction* v. *Maryland Casualty Co.*, *supra*, and *General Casualty Co.* v. *Second National Bank of Houston*, *supra*, which preceded and followed it, respectively.

[11] Petitioner argues (Pet. 13) that according to *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Co.*, 149 F. 2d 73, 79 (C. A. 5), the surety had the burden of proving that the loans had been diverted. However, as Judge Sibley pointed out in his strong dissent (149 F. 2d at 80), the Fifth Circuit had held only two years previously in *Town of River Junction* v. *Maryland Casualty Co.*, 133 F. 2d 57, 58 that the bank has the burden of

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1955.

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proof. Moreover, as we have shown in fn. 10, *supra*, the scope of the *Coconut Exchange Bank* case has been narrowed severely by *General Casualty Co.* v. *Second National Bank of Houston*, 178 F. 2d 679. Indeed, in that case the Court of Appeals stressed the finding by the District Court that from the weight of the evidence none of the advanced funds had been diverted (178 F. 2d at 680). We doubt whether the question as to which party has the burden of proof presents an issue of sufficient importance to warrant review by this Court; especially where it represents merely an intra-circuit conflict—not connected with this case—which probably has come to rest even within the Fifth Circuit.

APPENDIX

Statutes Involved

1. *R. S. Section 3477:* Prior to the passage of the Assignment of Claims Act of [October 9] 1940, Section 3477 of the Revised Statutes, now found, as amended, in 31 U. S. C. 203, provided:

> Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.[1]

[1] An amendment of May 27, 1908, 35 Stat. 411, incorporated into 31 U. S. C. 203 is not here relevant and is omitted.

2. *The Assignment of Claims Act of 1940:* Section 1 of this Act, 54 Stat. 1029, as amended May 15, 1951, 65 Stat. 41, 31 U. S. C. 203, in pertinent part provides:

* * * * *

> The provisions of [Section 3477 of the Revised Statutes] * * * shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*
>
> 1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;
>
> 2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;
>
> 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;
>
> 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a

true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940, as amended, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys

due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this Act, as amended, shall be deemed to affect or impair rights or obligations heretofore accrued.

3. *The Miller Act:* Section 1 (a) of the Miller Act of August 24, 1935, 49 Stat. 793, 40 U. S. C. 270a (a), in pertinent part provides:

> [B]efore any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to

any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. * * *

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 445

NATIONAL SURETY CORPORATION v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON,
Third Party Defendant.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON,
Intervenor.

BRIEF OF RESPONDENTS, NATIONAL SURETY CORPORATION AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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INDEX

PAGE

I—This Court has already held that, as between themselves, the rights of claimants to a contract balance where an assignment is involved are the same since the enactment of the Assignment of Claims Act of 1940 as they were prior thereto. This Court previously held that, as between themselves, a surety, as subrogee, has rights superior to a bank assignee 2

The Surety Companies Have a Superior Right to the Contract Balance as Against the Bank 4

II—Petitioner has violated Rule 23, subdivision 4, of the Rules of this Court in failing to present essential facts with accuracy 10

A. 10

B. 11

C. 11

D. The Question Presented for Review Is Inaccurately Stated in the Petition 12

E. The Decision of the Court of Claims Is Not in Conflict With the Decisions of This Court 14

F. The Decision of the Court of Claims Was Not Contrary to the Holding in United States v. Hadden, 192 Fed. 2d 327, Nor Inconsistent With Its Former Opinions 16

CONCLUSION 18

TABLE OF CASES CITED

PAGE

Alabama-Tennessee Nat. Gas Co. v. Lehman-Hoge & Scott, 122 Fed. Supp. 314 (D. C. Ala.) 5,6

Central National Bank of Richmond v. United States, 91 Fed. Supp. 738 17

Central State Bank v. U. S. F. & G. Co., 9 F. (2d) 326 ..... 5, 6, 14, 15

Coconut Grove Exchange Bank v. New Amsterdam Casualty Company, 149 Fed. 2d 73 ..... 3, 6, 15

Exchange State Bank v. Federal Surety Co., CCA-8, 28 F. (2d) 485 5

Farmers Bank v. Hayes, CCA-6, 58 F. (2d) 34 5

Fidelity & Deposit Co. of Md. v. Union State Bank, 21 F. (2d) 102 ..... 5, 6, 11

First Nat. Bank of Seattle v. City Trust, etc., CCA-9, 114 Fed. 529 4

General Casualty Company v. Second National Bank of Houston, 178 Fed. 2d 679 ..... 3, 6

Hardaway v. National Surety Company, 211 U. S. 552 ..... 4, 6, 10

Hardin County Savings Bank v. U. S., 106 Ct. Cls. 577, 65 Fed. Supp. 1017 ..... 5, 9, 16

Henningsen v. U. S. F. & G. Co., 208 U. S. 404 ..... 4, 6

Lacey v. Maryland Casualty Co., CCA-4, 32 F. (2d) 48 ..... 4, 5

Martin v. National Surety Company, 300 U. S. 588 ..... 2, 14, 15

Maryland Casualty Co. v. U. S., 100 Ct. Cls. 513, 53 Fed. Supp. 436 6

PAGE

McKenzie v. Irving Trust Company, 323 U. S. 365 ..... 2, 3, 8

Modern Industrial Bank v. U. S., 101 Ct. Cls. 808 5

Moran v. Guardian Casualty Co., App. D. C., 76 F. (2d) 439 5

Prairie State National Bank v. United States, 164 U. S. 227 ..... 4, 9

Royal Indemnity Company v. U. S., 117 Ct. Cls. 736, 39 Fed. Supp. 891 ..... 5, 7, 8

Scofield, In re, CCA-2, 215 Fed. 45 ..... 5, 6

Southern Surety Co. v. Holden, CCA-8, 14 F. (2d) 411 5

Standard Accident Insurance Co. v. Federal Nat. Bank, CCA-10, 112 F. (2d) 692 ..... 4, 5

Title Guaranty & Surety Co. v. Dutcher, et al., CCA-9, 203 Fed. 167 5

U. S. v. Crosland Const. Co., 120 Fed. Supp. 792 (D. C. So. Carolina) 6

U. S. F. & G. v. City of Bristow, et al., 4 F. (2d) 810 ..... 5, 6

United States v. Hadden, 192 Fed. (2d) 327 16

United States v. Munsey Trust Company of Washington, D. C., 332 U. S. 234, 67 S. Ct. 1599 4

Waxman v. United States, 112 Fed. Supp. 570 17

STATUTE AND RULE

Assignment of Claims Act of 1940 ..... 2, 3, 5, 6, 9, 11, 12, 16, 18

Rules of the Supreme Court of the United States:

Rule 23, Subdivision 4 ..... 1, 10, 18

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

NATIONAL SURETY CORPORATION v. THE UNITED STATES.
THE FIRST NATIONAL BANK IN HOUSTON,
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FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON,
Intervenor.

BRIEF OF RESPONDENTS, NATIONAL SURETY CORPORATION AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

To the Honorable Supreme Court of the United States:

There are two reasons why the petition for a writ of certiorari herein should be denied:

1. Because this Court has already decided the question in controversy;

2. Because the petitioner has violated Rule 23, subdivision 4, of the Rules of this Court by failing to present the essential facts with accuracy.

I

This Court has already held that, as between themselves, the rights of claimants to a contract balance where an assignment is involved are the same since the enactment of the Assignment of Claims Act of 1940 as they were prior thereto. This Court previously held that, as between themselves, a surety, as subrogee, has rights superior to a bank assignee.

In *McKenzie* v. *Irving Trust Company*, 323 U. S. 365, this Court referred to the Assignment of Claims Act of 1940 in detail, summarized the provisions thereof (p. 367) and said (p. 369):

> "The provisions of the statute governing assignment of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves. Martin v. National Surety Company, 300 U. S. 588."

The citation by this Court of its decision in the *Martin* case is significant. The *Martin* case was decided by this Court in 1937 before the amendment to the Assignment of Claims Act in 1940 permitting assignments to banks. It was held in the *Martin* case that the statute then existing prohibiting the assignment of claims was enacted to avoid the Government "becoming embroiled in conflicting claims" (p. 594). In that case this Court upheld the prior right of a surety against the subsequent assignee. The citation of that decision by this Court applying the holding therein to the Assignment of Claims Act of 1940 establishes beyond further controversy the law that the Assignment of Claims Act of 1940 did not affect the rights of claimants to contract balances as between themselves and that with the exception of the removal of the prohibition against assignment to banks, the law with respect thereto was unchanged.

The *McKenzie* case was decided by this Court on January 8, 1945.

The case of *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Company*, 149 Fed. 2d 73, was decided by the Court of Appeals for the Fifth Circuit on April 23, 1945. The case of *General Casualty Company* v. *Second National Bank of Houston*, 178 Fed. 2d 679, was decided by the same Court on December 29, 1949. Both of these cases upon which the petitioner relies to establish a conflict of decision as a ground for the granting of a writ of certiorari in the case at bar were therefore decided after the law as to the effect of the Assignment of Claims Act of 1940 was settled by this Court. It will be noted that in the *Coconut Grove* case, the Court referred to the "primary purpose" of the Assignment of Claims Act of 1940 as being for the benefit of the Government and in order to keep it from being embroiled in controversies between the contractors and their assignees and creditors (p. 77) yet contrary to the law as established by this Court in the *McKenzie* case, the Court nevertheless held that the Act did affect the rights of sureties so as to subordinate them to the rights of assignees.

Undoubtedly, if certiorari had been sought in the Fifth Circuit cases, they would have been reversed as contrary to the decision of this Court and therefore calling for an exercise of this Court's power of supervision. However, that is no ground for a review of the decision in the case at bar which conforms to the law as established by this Court. In other words, the decisions in the Fifth Circuit do not present a true case of conflict of decision upon which certiorari should be granted by this Court.

The Surety Companies Have a Superior Right to the Contract Balance as Against the Bank

Since the decision of this Court in *Prairie State National Bank* v. *United States,* 164 U. S. 227, it has been uniformly held that a surety making payments to laborers and materialmen upon a payment bond given in connection with a Government contract has a prior right to contract balances against the assignees. In the *Prairie State National Bank* case, it was held that the right of an assignee was subordinate to the right of subrogation in the surety.

In *United States* v. *Munsey Trust Company of Washington, D. C.,* 332 U. S. 234, 240, 67 S. Ct. 1599, 1602, decided June 23, 1947, it was said:

> "But the Surety urges that it is subrogated also to the rights of laborers and materialmen whom it paid and/or the United States. From Prairie State National Bank of Chicago v. United States, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412, to American Surety Company v. Sampsell, 327 U. S. 269, 66 S. Ct. 571, 90 L. Ed. 663, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available monies ahead of others whose claims come from the advance of money."

Other decisions sustaining the prior right of the surety are as follows:

Hardaway v. *National Surety Company,* 211 U. S. 552;

Henningsen, et al. v. *U. S. F. & G. Co.,* 208 U. S. 404;

Lacey v. *Maryland Casualty Co.,* CCA-4, 32 F. (2d) 48;

Standard Accident Insurance Co. v. *Federal Nat. Bank,* CCA-10, 112 F. (2d) 692;

First Nat. Bank of Seattle v. *City Trust, etc.,* CCA-9, 114 Fed. 529;

Exchange State Bank v. *Federal Surety Co.*, CCA-8, 28 F. (2d) 485;
Farmers Bank v. *Hayes*, CCA-6, 58 F. (2d) 34;
U. S. F. & G. Co. v. *City of Bristow, et al.*, 4 F. (2d) 810;
Central State Bank v. *U. S. F. & G. Co.*, 9 F. (2d) 326;
Fidelity & Deposit Co. of Md. v. *Union State Bank*, 21 F. (2d) 102;
Title Guaranty & Surety Co. v. *Dutcher, et al.*, CCA-9, 203 Fed. 167;
In re Scofield, CCA-2, 215 Fed. 45;
Southern Surety Co. v. *Holden*, CCA-8, 14 F. (2d) 411;
Moran v. *Guardian Casualty Co.*, App. D. C., 76 F. (2d) 439.

And, of course, in addition to the above, there are the cases in the Court of Claims prior to the case at bar decided since the enactment of the Assignment of Claims Act of 1940.

Royal Indemnity Company v. *U. S.*, 117 Ct. Cls. 736, 93 Fed. Supp. 891;
Hardin County Savings Bank v. *U. S.*, 106 Ct. Cls. 577, 65 Fed. Supp. 1017;
Modern Industrial Bank v. *U. S.*, 101 Ct. Cls. 808.

It has likewise been held that the surety's priority extends to all the funds in the hands of the United States and such right is not limited to retained percentages included therein.

Lacey v. *Maryland Casualty Company*, 32 Fed. (2d) 48 (CCA-4);
Standard Accident Insurance Company v. *Federal National Bank*, 112 Fed. (2d) 692 (CCA-10);
Farmers Bank v. *Hayes*, 58 Fed. (2d) 34 (CCA-6);
Alabama-Tennessee Nat. Gas Co. v. *Lehman-Hoge & Scott*, 122 Fed. Supp. 314 (D. C. Ala.).

And such priority is sustained in favor of sureties making payments on payment bonds even though the sureties have not completed the contracts.

Henningsen et al. v. *U. S. F. & G. Co.*, 208 U. S. 404;
Maryland Casualty Co. v. *U. S.*, 100 Ct. Cls. 513, 53 Fed. Supp. 436;
Alabama-Tennessee Nat. Gas. Gas v. *Lehman-Hoge & Scott*, 122 Fed. Supp. 314 (D. C. Ala.);
U. S. v. *Crosland Const. Co.*, 120 Fed. Supp. 792 (D. C. So. Carolina);
Hardaway v. *National Surety Co.*, 211 U. S. 552;
U. S. F. & G. Co. v. *City of Bristow*, 4 F. (2d) 810;
Central State Bank v. *U. S. F. & G. Co.*, 9 F. (2d) 326;
Fidelity & Deposit Co. of Maryland v. *Union State Bank*, 21 F. (2d) 102;
In re Scofield, 215 Fed. 45.

The decision of the Court of Claims in the case at bar follows the decisions of this Court and all the other decisions sustaining the prior right of the surety and was in all respects proper.

Petitioner cites no case other than the *Coconut Grove* case and the *General Casualty* case, both in the Fifth Circuit, which are contrary to the law so uniformly settled and established as to the priority right of the surety. These cases are based upon a misconstruction of the provision in the Assignment of Claims Act of 1940 to the effect that notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Act shall constitute a valid assignment for all purposes. The true intent of such provision was stated in the dissent of Circuit Judge Sibley in the *Coconut Grove* case where he said (p. 80):

> "It is true the Act says: 'Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this paragraph shall con-

stitute a valid assignment for all purposes'; but I think the validity asserted is against all the other laws referred to, and for all purposes for which assignments are usually valid. The primary purpose of the Act was to remove the impediment which the federal statutes had before imposed, and to make it safe and lawful for the United States to pay the assignee without enquiry into the equities of other persons. It was not intended to upset the established doctrines as to the relation of such assignments to the rights of the surety on the contractor's bond, or those of the laborers and materialmen to be paid out of the proceeds of the job."

Similarly, the correct interpretation of such provision of the Act was stated by the Court of Claims in the *Royal Indemnity* case, supra, where it was said:

"The bank contends that the provision in the 1940 Act that, 'Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this paragraph and the following paragraph shall constitute a valid assignment for all purposes' has the effect of making the assignment to it by the contractor the *only* allowable claim against the Government, superior to the claims of suppliers, laborers, or surety.

'Notwithstanding any law to the contrary' is a strong phrase and, read out of context, seems to support the above position. The next phrase, however, is 'governing the validity of assignments.' Taken together, as they must be, the statute reads, 'Notwithstanding any law to the contrary governing the validity of assignments an assignment pursuant to this paragraph and the following paragraph shall constitute a valid assignment for all purposes.' What was the law in 1940 governing the validity of assignments of claims against the United States? It was the law expressed in Rev. Stat. 3477 and 3737 to the effect that any assignment of an unliquidated claim against the United States should be null and void. The 1940 Act recites its purpose to be 'To assist in the national-defense program by amending sections 3477 and 3737 of the Revised Statutes to permit the assignment of claims under

public contracts.' It was *these* statutory provisions that the Congress referred to in the phrase, 'Notwithstanding any law to the contrary governing the validity of assignments.' The long-established principle that an assignee with notice of a prior equity takes only the interest of the assignor was not legislated away by the 1940 Act. The purpose and effect of the 1940 Act was to make a contract claim against the United States assignable before maturity to some single financial institution for the purpose of securing credit; nothing more. No other view would seem compatible with the wording and history of the Act and with expressions of Members of Congress who enacted it into law.

The intervening bank, which took the legal assignment with knowledge of the surety's prior equity and lent money on the faith thereof stands now in the exact position that would have been occupied by the contractor had there been no assignment and were the contractor himself now before this court."

We have already shown that this Court in *McKenzie* v. *Irving Trust Company,* supra, held that the Assignment of Claims Act of 1940 was not intended to regulate the equities of claimants as between themselves.

The Court of Appeals in the Fifth Circuit has read into the statute not only a provision that assignments under the Act shall be given priority over sureties on contract bonds, but also a provision that the surety is required to prove a wrongful diversion of the funds loaned by the bank and that in the absence of such proof, the bank is entitled to priority in payment of the balances (see *Coconut Grove* case, p. 79). The Judges in the Court of Claims who dissented in the *Royal Indemnity* case and in the case at bar have adopted the construction of the Act applied by the Courts in the Fifth Circuit.

There is no basis for reading into the statute provisions as to order of priority or requirements as to proof. If it were intended that the subrogation rights of sureties should

be subordinate to the claims of assignees or that a surety should be required to prove diversion of the funds loaned by banks to contractors, the same should be clearly expressed in the statute.

So in *Hardin County Savings Bank* v. *United States*, supra, it was said:

> "We have examined the history of the Act and find nothing in it which shows that by this provision Congress intended anything more than that an assignee should 'stand in the shoes' of the assignor, and that an assignment made in conformity with the Act should not be declared invalid because of the provisions of R.S. sections 3477 and 3737, 31 USCA section 203; 41 USCA section 15. An assignment by a contractor may be valid for all purposes but inoperative to extinguish the contractual rights of the Government and those of the surety on the contractor's bond. It cannot, therefore, be said that Congress intended to overturn the rule of law announced and applied in the decided cases and give an assignee greater rights than he would have had if sections 3477 and 3737 R.S. had not been enacted. It had been established before the Assignment of Claims Act of 1940 was enacted that a contractor could not by an assignment of amounts due under his contract convey any greater rights with respect thereto than he possessed under his contract and that an assignee making advances on the faith of such assignment assumed the risk incident to the failure of such contractor to fulfill his contractual obligations; it would, therefore, require clear and specific language to justify the conclusion that Congress intended by the Act of 1940 to legislate to the contrary."

The bank which makes a loan secured by an assignment of a contract balance does so with full knowledge of the rights of sureties on the bonds executed by them and as stated in *Prairie State National Bank*, supra, is a mere volunteer. The surety, however, has no control over assignments given by the contractor. The Assignment of Claims Act does not authorize sureties to approve or dis-

approve such assignments and the consent of the surety is not necessary to the validity thereof.

The effect of the decisions in the Fifth Circuit is to enable a contractor, after he has obtained a bond, to assign all the funds due to him from the Government and leave the sureties without the protection which they have uniformly been held to have in the unpaid contract balances for payments required to be made by them on performance and payment bonds, without which no contract would be awarded in the first instance.

II

Petitioner has violated Rule 23, subdivision 4, of the Rules of this Court in failing to present essential facts with accuracy.

A.

It is stated in the petition (p. 5) that subsequent to the default of the contractor in the completion of the contracts, the surety companies abandoned said contracts and that they were completed by the United States of America. It is further stated in the petition (p. 10) that the surety companies permitted the United States Government to arrange for completion of the work out of retained percentages and other amounts to become due on completion of the contracts. These statements are inaccurate.

In the *National Surety* case it was stipulated by all parties and the Court of Claims found that the Government accepted the contract as completed (R. 54, Finding 5 in Decision of Court of Claims). There was no abandonment by the National Surety Corporation of the contract or completion by the United States as stated in the petition nor were there any completion costs assessed by the Government against the contractor in arriving at the balance due on the contract.

In the *Fidelity and Deposit* case, it is true that the contractor defaulted and the Government relet the work for completion and assessed the completion costs against the balance due on the contract and it was so stipulated by all the parties and the Court so found (Opinion p. 39, Finding 29). However, there was no abandonment of the contract by the surety company, but the surety advised the Government that it elected not to proceed with completion, whereupon, in accordance with usual practice, the Government completed and charged the costs thereof against the balance due on the contract.

B.

It is stated in the petition that the assignment to the First National Bank in Houston under the Assignment of Claims Act was given to secure repayment of funds loaned to the contractor (Petition, p. 6).

The petitioner fails to state that at the time such assignment was executed, no loan was made to the contractor. It was so stipulated and the Court of Claims so found (R. 64, 115; Findings of Court of Claims 19 and 43).

C.

It is stated in the petition that the record is clear that the funds loaned by the bank to the contractor were made to assist and enable it to carry on and perform its contracts with the defendant (Petition, p. 7). Petitioner makes no reference to the record to support such statement. All the facts were stipulated in the Court below. There is no stipulation whatever that the funds were used to perform the contracts. The parties stipulated as to the loans made to the contractor (R. 61 and 110) but there was no stipulation or evidence in the record as to the use of the funds.

Indeed, the Court of Claims referred to the absence of any evidence to show the use of the funds and said (Opinion, pp. 20-21):

> "Furthermore, it does not affirmatively appear in this case whether or not the money borrowed from the bank was used in the performance of these contracts, and, if so, which of the two. The purpose of the 1940 amendment to the Assignment of Claims Act (41 U. S. C. 15; 61 Stat. 501; 65 Stat. 41) was to enable a contractor to obtain money to finance his contracts with the United States. If the money borrowed was not used in the performance of the contract, the lender is not equitably entitled to the benefit of the assignment."

D.

The Question Presented for Review Is Inaccurately Stated in the Petition

The petition states that the question presented for review is whether the claims of sureties based upon assignment provisions in the contractor's applications for bonds are prior and superior to the claim of the bank resting upon assignment to it under the Assignment of Claims Act (Petition, p. 3). In the amplification of reasons relied on for the allowance of the writ, the petitioner again refers to the assignment to the bank as the only legal and valid assignment in the case and states that the surety companies do not have a valid, legal assignment of the unpaid balances of the contracts (Petition, p. 7).

Throughout this case, the petitioner has ignored the claims of the surety companies based upon rights of subrogation and not upon any assignment. The decision in the Court below did not rest upon any assignment to the surety companies contained in applications for the bonds, but recovery was allowed to the sureties solely upon their subrogation rights. There is not a single reference in the opinion of the Court below to any assignment by the con-

tractor to the sureties. The decision rested squarely upon the surety's rights arising by subrogation. The Court, referring to the rights of laborers and materialmen to which the sureties became subrogated said:

> "They claim subrogation to their rights against the contractor and to the rights of the United States on the bonds" (Opinion, p. 16).
>
> "In each case we have decided that the equity of the surety company was superior to the rights acquired by the bank under a valid legal assignment * * *" (Opinion, p. 16).
>
> "We reiterate our former opinion that the equity of the surety company is superior to the rights of the bank acquired under an assignment, whether the surety's rights are derived from the discharge of its liability on a performance bond or on a payment bond * * *" (Opinion, pp. 16-17).
>
> "When the surety pays the laborers and materialmen, it becomes subrogated to their right to assert an equitable claim to the moneys in the hands of the defendant * * *" (Opinion, p. 19).
>
> "Looked at from another light, the surety's rights are superior to the rights of the bank: It is settled that the surety's rights arising by subrogation or substitution relate back to the date of the execution of the surety bonds" (Opinion, p. 20).

The question decided by the Court of Claims was therefore not whether the assignments contained in the contractor's application for the bonds were superior to the assignment to the bank, but whether the surety's subrogation rights were superior to the assignment to the bank.

It is true that when the bonds were originally obtained, the contractor assigned the monies to become due to the sureties, effective on default, but the Court of Claims rested its decision on the right of subrogation.

E.

The Decision of the Court of Claims Is Not in Conflict With the Decisions of This Court

It is stated in the petition (p. 2) that the opinion of the majority of the Court of Claims is in direct conflict with the opinions of this Court in *Central Bank* v. *United States*, 345 U. S. 639, 646, and *Martin* v. *National Surety Company*, 300 U. S. 588.

There is no conflict whatever between the decision of the Court of Claims and the foregoing decisions of this Court.

In *Central Bank* v. *United States*, supra, there was an action by a bank to recover an unpaid balance on a contract in which the Government claimed an offset for taxes due from the contractor. This Court refused to permit the set-off under the provisions of the Assignment of Claims Act expressly providing that there should be no set-off for any indebtedness of the contractor arising independently of the contract.

No surety on the bond of the contractor was involved in that case nor was there any intimation or reference to the surety's rights of subrogation.

The only basis for the petitioner's conclusion that the decision of the Court of Claims herein was in "direct conflict" with the decision of this Court in the *Central Bank* case, is the statement of this Court that the Assignment of Claims Act should be construed so as to carry out the purpose of Congress to encourage private financing of Government contracts (Petition, p. 7). The Court of Claims made no statement to the contrary nor did it pass on the same question involved in the *Central Bank* case. All that the Court of Claims held was that the Assignment of Claims Act was intended to do nothing more than to remove the prohibition against the assignment of a claim against the United States in the case of a financial institu-

tion lending money to a contractor and that under such an assignment, a bank, insofar as prior obligations were concerned, received no more than it would have gotten if the Act had not been passed (Opinion, p. 6). Obviously, there is no conflict whatever between the decision of the Court of Claims and the decision of this Court in the *Central Bank* case.

It is stated in the petition that the decision of the Court of Claims is also in conflict with the opinion of this Court in *Martin* v. *National Surety Company*, 300 U. S. 588. In that case, this Court upheld the rights of a surety on a payment bond against the claims of a subsequent assignee to a contract balance. The decision of the Court of Claims herein was therefore not in "direct conflict" with the decision of this Court, but, on the contrary, was in conformance therewith. This Court, in the *Martin* case, upheld the surety against the bank under the statute as it existed before the 1940 amendment. There is not a single suggestion in the petition herein to show how the decision of the Court of Claims conflicts with the *Martin* decision. There was a reference to the *Martin* decision in the quotation in the petition (p. 11) from the case of *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Company*, 149 Fed. (2d) 143, wherein the Circuit Court of Appeals for the Fifth Circuit referred to the Act prior to the 1940 amendment as having been construed by this Court in the *Martin* decision as having for its primary purpose the protection of the Government. The petition is utterly devoid of any statement of fact or argument in support of the reason given by the petitioner for the allowance of certiorari that the decision of the Court of Claims is in "direct conflict" with the decision of this Court in the *Martin* case. The recklessness of the statements contained in the petition becomes striking when it is noted that the Court of Claims in the case at bar relied on the *Martin* decision of this Court as one of the authorities for upholding the equitable priority of the sureties against the claim of the bank (Opinion, p. 19).

F.

The Decision of the Court of Claims Was Not Contrary to the Holding in *United States* v. *Hadden*, 192 Fed. 2d 327, Nor Inconsistent With Its Former Opinions

It is stated in the petition (p. 2) that the opinion of the majority of the Court of Claims is contrary to the view expressed by the United States Court of Appeals for the Sixth Circuit in *United States* v. *Hadden*, 192 Fed. (2d) 327. In that case, suit was brought by the United States to recover a payment erroneously made to the contractor. The contractor had assigned the proceeds to a factoring corporation to whom payment was made by the contractor. The Court there held that in the absence of a provision in the Assignment of Claims Act reserving the right to the Government to recover erroneous payments from assignees, no such right existed and the matter was governed by the general law of restitution. Clearly, there is no conflict with the *Hadden* decision even though it was said in that case that the purpose of the Act was to make it easier for Government contractors to secure financing for Government contracts.

The holding in the *Hadden* case that in the absence of provision to the contrary, the general law as to restitution would govern is in conformity with the holding in *Hardin County Savings Bank* v. *United States*, 65 Fed. Supp. 1017, which was one of the cases relied on by the Court of Claims in our case (Opinion, p. 16) wherein it was said that it would require clear and specific language in the statute to justify the conclusion that Congress intended by the Act of 1940 to give an assignee greater rights than he would have had if the statute had not been enacted.

Moreover, there were no rights of sureties involved in the *Hadden* case, and the question at issue before the Court was entirely different from the case at bar. Hence, there can be no conflict in the decision in our case with the *Hadden* case. It is also to be noted that there is not a single word

of fact or argument in the petition attempting to support the conclusion that there is such a conflict other than the reference to the statement in both cases that the Assignment of Claims Act was enacted to enable contractors to finance their Government contracts.

It is further stated in the petition (p. 2) that the decision of the Court of Claims herein is inconsistent with its own opinions in *Waxman* v. *United States*, 112 Fed. Supp. 570, and *Central National Bank of Richmond* v. *United States*, 91 Fed. Supp. 738.

The only similarity in those decisions to the case at bar is that in both cases, the Court of Claims held that the Act was passed to enable Government contractors to secure financing for their Government contracts. There is no other similarity of fact or issue involved in those cases.

In *Waxman* v. *United States*, supra, an action was brought by a contractor under the Lucas Act for losses sustained in the performance of a Government contract. The Court held that an assignee under the Assignment of Claims Act was a proper party to such suit. The rights of sureties were not involved.

In the *Central National Bank* case, supra, the assignee sued to recover a balance on contract which the Government had mistakenly paid to the contractor notwithstanding the assignment. It was held that the effect of the Act is to place the Government in the same position as that of any ordinary debtor, that the payment to the contractor contrary to the assignment was at the Government's peril and that the assignee was entitled to recover from the Government. The Court further said (p. 740):

> "When a question regarding assignments as they affect the Government arises, the general law of assignments must govern."

It will be noted from the above holding that it conforms to the decision of the Court of Claims in the case at bar to

the effect that the Assignment of Claims Act did not change the rights of assignees; that the bank, insofar as prior obligations were concerned, received no more than it would have gotten had the statute not been enacted (Opinion, p. 21).

CONCLUSION

Petitioner has failed to comply with Rule 23 of the Rules of this Court, in that it has failed to present a correct statement of the facts in the record; failed to present the proper question for review; and made erroneous statements as to alleged conflict of the decision in the case at bar with decisions of this Court and other courts and of an alleged inconsistency in the decision in the case at bar with prior decisions of the Court of Claims. This Court has held that in such circumstances, without more, a petition for certiorari will be denied.

The petition should also be denied on the ground that there is no true conflict of decision upon which review on certiorari should be granted since this Court has already established the law of the case with respect to the effect of the Assignment of Claims Act of 1940 on the rights of claimants to contract balances as between themselves.

The petition should also be denied on the ground that the decision of the Court of Claims in the case at bar was in all respects correct and proper.

Respondents, National Surety Corporation and Fidelity and Deposit Company of Maryland therefore submit that the petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

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